IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

~~76~~-1773

No. ———

TEXAS INTERNATIONAL AIRLINES, INC.; DELTA AIR LINES, INC.; AMERICAN AIRLINES, INC.; FRONTIER AIRLINES, INC.; OZARK AIR LINES, INC.; EASTERN AIR LINES, INC.; AND CONTINENTAL AIR LINES, INC.,
Petitioners,

v.

SOUTHWEST AIRLINES CO. AND
THE TEXAS AERONAUTICS COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Texas International Airlines, Inc.; Delta Air Lines, Inc.; American Airlines, Inc.; Frontier Airlines, Inc.; Ozark Air Lines, Inc.; Eastern Air Lines, Inc.; and Continental Air Lines, Inc., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered on January 28, 1977, which affirms an injunctive order from the District Court for the Northern District of Texas enjoining and restraining petitioners

from litigating in state court or in other court action certain matters said to have been determined by a prior judgment of the federal court.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which is sought, is reported at 546 F.2d 84 and is set forth at page 1a of the separately-bound Appendix to this petition. Earlier opinions in this and related litigation, also set forth in the Appendix, are reported as follows:

(1) The opinion of the District Court for the Northern District of Texas, dated June 21, 1973, granting a declaratory judgment in favor of Southwest Airlines Co. in a suit against it by the Cities of Dallas and Fort Worth and by the Dallas-Fort Worth Regional Airport Board, is reported as *City of Dallas, Texas* v. *Southwest Airlines Co.*, 371 F.Supp. 1015. (App. 1d).

(2) The opinion of the Court of Appeals for the Fifth Circuit, dated May 31, 1974, affirming the District Court's grant of a declaratory judgment, is reported as *City of Dallas, Texas* v. *Southwest Airlines Co.*, 494 F.2d 773. (App. 1c).

(3) The opinion of the District Court for the Northern District of Texas, dated June 5, 1975, enjoining the present petitioners from litigating certain issues in state court, is reported as *Southwest Airlines Co.* v. *Texas International Airlines, Inc.*, 396 F.Supp. 678. (App. 1b).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 28, 1977. Timely petitions for rehearing were filed on February 11, 1977, and denied on March 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is it permissible under the Due Process Clause to hold that a judgment in a suit brought by a governmental unit precludes subsequent litigation by private parties who did not participate in the prior suit, when those private parties have separate and distinct interests different from those of the general public?

2. Do principles of equity, comity, and federalism permit a federal court to enjoin state court litigation on unclear questions of state law, dealing solely with the internal regulatory systems of a state, in order to protect and effectuate an earlier federal court judgment that made a forecast of the state law on the point?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the separately-bound Appendix beginning at page 1e. They include the following:

1. United States Constitution, Amendment V. (App. 1e).

2. United States Code, Title 28, Section 2283. (App. 1f).

3. Texas Constitution, Article 11, Section 5. (App. 1g).

4. Texas Aeronautics Commission Act, Texas Revised Civil Statutes Annotated, Article 46c-6, Subdivisions 1 and 3. (App. 1h).

5. Texas Municipal Airports Act, Texas Revised Civil Statutes Annotated, Article 46d-7. (App. 1i).

6. 1968 Regional Airport Concurrent Bond Ordinance of the Cities of Dallas and Fort Worth, Sections 2.1G and 9.5A. (App. 1j).

STATEMENT OF THE CASE

Background of the Controversy

This dispute began with a Civil Aeronautics Board ("CAB") order in 1964, requiring the Cities of Dallas and Fort Worth to designate a single airport for CAB-approved service in their region. To comply with this order, the cities agreed to construct the Dallas-Fort Worth Regional Airport ("DFW") at a point midway between them. In implementing the agreement, they adopted the 1968 Regional Airport Concurrent Bond Ordinance. Besides authorizing the issuance of revenue bonds, the ordinance provided for a phase-out of scheduled air service at Love Field, Dallas (the "phase-out provision"). In 1970 the eight airlines certificated by the CAB to serve Dallas and Fort Worth, including the present petitioners, executed Letter Agreements with the Dallas-Fort Worth Regional Airport Board agreeing to "move all of [their] Certificated Air Carrier Services serving the Dallas-Fort Worth area to the [new] airport * * * to the extent required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance." The Letter Agreements also provided that the carriers that entered into them agreed to pay rentals, fees, and charges to the Regional Airport Board that, together with amounts paid by other users of the airport, would be sufficient to produce enough revenue to pay the operating and maintenance expenses of the airport plus 1.25 times the debt requirements on the Regional Airport revenue bonds. Thus the CAB carriers agreed to underwrite the costs of DFW on the understanding that scheduled services would be precluded at Love Field.[1]

[1] All parties recognized that unless Love Field was substantially closed to scheduled traffic it would be impossible to generate revenue at DFW sufficient to pay its cost because of the tendency of the public to use the airport closest to the largest population center. For this and other reasons, the Federal Aviation Administration insisted that it would not grant federal funds to DFW unless Love Field was closed to scheduled flights. *See* 5th Cir. No. 73-2748, App. Vol. 3, p. 942.

In 1971 Southwest Airlines, a purely intrastate carrier, began scheduled air service from Love Field under a certificate of public convenience and necessity issued by the Texas Aeronautics Commission ("TAC"). The certificate authorized Southwest to provide service between the points Dallas/Fort Worth, Houston, and San Antonio "at any airports serving those points named herein." The certificate did not mention Love Field. On November 12, 1971, the TAC, without notice of hearing to anyone, adopted Minute Order No. 22. It provided: "From and after the date hereof, no air carrier operating under a Certificate of Public Convenience and Necessity issued by the Commission shall, without the prior written approval of the Commission, discontinue all air service to any airport through which such carrier presently provides air service."[2] The order did not mention Southwest or Love Field.

The City of Dallas Case

Southwest refused to enter into a Letter Agreement with the Regional Airport Board and made known its intention to continue operating from Love Field. In 1972 the cities and the Airport Board filed suit in federal court requesting a declaratory judgment of their right to exclude Southwest from Love Field. Southwest counterclaimed for a declaration of its right to remain at the field and for an injunction to enforce that right.

The CAB carriers were not parties to this action, although Southwest could have joined them as parties on its counterclaim as provided by Fed. R. Civ. P. 13(h). When the case came on for hearing, Southwest moved to

[2] The minutes of the TAC meeting reflect that the adoption of Minute Order No. 22 was one of seven items of business at a meeting that lasted exactly 60 minutes.

"hold in abeyance for want of indispensable parties," explaining twice to the court that the reason for its motion was that unless the CAB carriers were joined, any determination in the case would not be binding on them.[3] Counsel for Southwest also told the court: "This is why any decree entered herein will begin rather than end litigation for all parties at interest over what is a single controversy over the meaning of that ordinance."[4] The court refused to hold the case in abeyance and ruled that it would not "let any new parties be brought in at this time."[5]

The District Court then ruled for Southwest on a variety of grounds, some based on federal law and others on state law. It held that the cities and the Board could "not lawfully exclude the defendant, Southwest Airlines Co., from the use of Love Field, Dallas, Texas, and its airport facilities so long as Love Field remains open as an airport." 371 F.Supp. at 1035 (App. 34d).

In 1974 the Fifth Circuit affirmed this judgment. That court found it "unnecessary to discuss" any of the federal grounds that were the basis for federal jurisdiction and that had been relied on in part by the District Court. 494 F.2d at 777 (App. 7c). It rested its decision solely on its understanding that the power of the TAC under Texas law includes the power to determine the points of origin and destination of flights, that "Southwest has been certificated by the Commission into Love Field and directed to continue service there until told otherwise," and that "Dallas being Texas' creature, it may not declare otherwise." 494 F.2d at 777 (App. 6c).

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[3] 5th Cir., No. 73-2478, App. Vol. 2, pp. 466, 468, 473.

[4] *Id.* at 469.

[5] *Id.* at 480.

The State Litigation

Other litigation, not presently relevant, then followed.[6] The next relevant litigation is a suit instituted by Texas International on December 10, 1974, in the 200th District Court in Austin, Texas. Texas International contended that the phase-out provision of the 1968 Bond Ordinance is valid under Texas law and that the TAC certificate and order, under Texas law, did not and could not have the effect attributed to them by the federal courts in the *City of Dallas* case. In the alternative, Texas International urged that if the phase-out provision was invalid, the CAB carriers should be held to be excused from their obligation under the Letter Agreements to transfer their services to DFW and from their financial obligation. The complaint in the state action named as principal defendants the Regional Airport Board, the Cities of Dallas and Fort Worth, and the TAC. Joined also as defendants because of their interest in the subject matter of the litigation were the other CAB airlines and Southwest. Most of the CAB carriers admitted most of the allegations of the complaint, though some of them also prayed that Dallas be required to close Love Field as an airport if this was the only way to comply with the phase-out provision.

Southwest and the TAC filed pleas in abatement and to the jurisdiction as well as answers. They fully participated in the state court case by filing briefs and participating in extensive oral argument of their pleas at a hearing in the state court on February 21, 1975. In this hearing they argued that the state action was foreclosed by the federal judgment in the *City of Dallas* case. Their pleas were overruled.

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[6] That litigation is briefly described in the most recent opinion from the Fifth Circuit. 546 F.2d at 88 (App. 3a).

The Present Litigation

One month after the state court hearing Southwest filed the present action in the District Court for the Northern District of Texas seeking to enjoin so much of the state court proceeding as attempted to exclude Southwest from Love Field so long as it remains open as an airport. The District Court held that the CAB carriers were bound by the judgment in the earlier case to which they were not parties, on the alternative theories that litigation by the cities made the doctrine of "virtual representation" applicable or that the Letter Agreements between the CAB carriers and the Regional Airport Board created a "privity relationship" between them. 396 F.Supp. at 684-686 (App. 10b-16b).

The case then went to the Fifth Circuit and produced the judgment of which review is now being sought. The exercise of federal jurisdiction was upheld on the ground that this action was "supplemental or ancillary" to the *City of Dallas* case. 546 F.2d at 89-90 (App. 7a-9a). The Fifth Circuit expressly rejected the theories of "privity by letter agreement" and "virtual representation" that had been relied on by the District Court. 546 F.2d at 96-97 (App. 21a-24a). Nevertheless, the judgment below was affirmed on the theory that "[b]ecause legal interests of the carriers do not differ from those of Dallas in *Southwest I*, we hold that they received adequate representation in the earlier litigation and should be bound by the judgment in that litigation." 546 F.2d at 100 (App. 30a-31a).

REASONS FOR GRANTING THE WRIT

This case, in its present posture, raises no issue about whether Southwest Airlines should fly from Love Field or DFW. Instead it raises fundamental due process issues on the extent to which one may be bound by a judgment in an action to which he is not a party. It raises also issues of federalism and comity concerning the ex-

tent to which a federal court may use the "relitigation" exception to the Anti-Injunction Act, 28 U.S.C. § 2283, to protect a federal judgment that rested solely on a forecast of what state law might be on an unclear issue of internal state affairs. These questions of due process and of federalism are issues on which only this Court can speak with authority, and they are issues of such importance to the constitutional scheme that this Court has a particular responsibility to provide authoritative guidance about them.

The Fifth Circuit has decided important questions of federal law that either have not been, but should be, settled by this Court or that were decided below in a way in conflict with applicable decisions of this Court and of another court of appeals. These questions should be heard here.

1. Due Process Denied

It is beyond dispute that the extent, if any, to which a judgment can be given preclusive effect on one not a party to the action is not a mere nicety of the law of res judicata but is a constitutional question, controlled by the Due Process Clauses. *Hansberry* v. *Lee*, 311 U.S. 32 (1940).[7] This Court has recently summarized the applicable doctrine.

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

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[7] Even on res judicata issues that do not reach constitutional proportions, the court below was surely right in holding that the binding effect of a federal court judgment is determined by federal law. 546 F.2d at 94 (App. 17a). *See* Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971). Some of the issues presented by the CAB carriers in the state action are identical to issues decided by the federal courts in the *City of Dallas* case. That fact alone cannot deprive them of their constitutional right to their own day in court on these issues, since they were not parties to that case.

The CAB carriers can be precluded by the prior judgment only if the relation of the cities and the Board, the parties in the first case, to the CAB carriers "is such as legally to entitle the *former* to stand in judgment for the latter." *Hansberry* v. *Lee*, 311 U.S. 32, 43 (1940). That kind of question has traditionally been phrased in terms of "privity," but, as Judge Wisdom writing for the court below correctly recognized, "'privity' denotes a legal conclusion rather than a judgmental process." 546 F.2d at 95 (App. 19a). A current project of the American Law Institute, *Restatement Second of Judgments*, offers a more sophisticated analysis that avoids the use of conclusory terms such as "privity"—and "virtual representation"—and attempts instead to identify the various relationships that may permit an absentee to be bound by a judgment. Sections 78 to 88 of that work speak to the effect of judgments on parties and persons represented by parties, while §§ 89 to 111 take up substantive legal relationships resulting in preclusion.[8]

The court below rejected the arguments on which the District Court had held the CAB carriers bound. It found

[8] The fruits of this work so far appear in four Tentative Drafts, No. 1 (1973), No. 2 (1975), No. 3 (1976), and No. 4 (1977). When references are made to particular sections of *Restatement Second*, the draft in which it appears will be identified. All of the portions of *Restatement Second* referred to in this petition have been approved by the Institute, subject only to editorial changes, most recently with the approval of Tentative Draft No. 4 on May 18, 1977.

no merit in the contentions that the Letter Agreements between the carriers and the Airport Board created either "concurrent privity" or "successive privity" and it did not believe that a generalized doctrine of "virtual representation" was a legitimate basis on which to bind the CAB carriers. 546 F.2d at 96-98 (App. 21a-24a). Instead the court, while recognizing that "the federal judiciary has never faced the precise question posed by the instant facts" 546 F.2d at 98 (App. 27a), thought it found in § 85(d) of *Restatement Second of Judgments* (Tent. Dr. No. 2, 1975), and in Comment *d* to that section, support for the proposition that the CAB carriers were adequately represented by the governmental agencies that brought and lost the first action. It seems clear, however, that the court misconstrued and misapplied both § 85(d) and the law that it restates.

Section 85(d) of *Restatement Second*, on which the Fifth Circuit relied, provides in relevant part:

> A person is represented by a party who is:
>
> * * *
>
> (d) An official or agency invested by law with authority to represent the person's interests.
>
> * * *

Comment *d*, at 61, expands on that by saying that "a public official may have authority to maintain or defend litigation on behalf of individuals or of a collective public interest." The Comment goes on to distinguish three classes of cases, of which the court found the second was applicable to the present case. The second category includes cases in which "the authority of the public official or agency is coexistent with that of individuals or members of the public, such as citizens or taxpayers," but "the official or agency's authority to maintain or defend litigation concerning the interest should be con-

strued as preempting the otherwise available opportunity of the individual or members of the public to prosecute * * *." *Id.* at 62. The court found that it should be so construed in this case on the basis that the "legal interests of the carriers do not differ from those of Dallas" in the *City of Dallas* case. 546 F.2d at 100 (App. 30a).

There are several difficulties with holding that this rule can be applied to preclude the CAB carriers in the present case. The first is that there is very little case authority to support it, particularly as applied to the present facts. As the court below noted, 546 F.2d at 99 n. 55 (App. 28a), the only federal case mentioned in the Reporter's Note on this second category of Comment *d*, *id.* at 68, is *Patterson* v. *Burns*, 327 F.Supp. 745 (D. Haw. 1971). It is precedent against preclusion in this category of cases and is so cited by the Reporter. Of the four state cases cited by the Reporter in support of preclusion, two are distinguished by the Fifth Circuit itself as cases in which private parties lacked standing to sue, 546 F.2d at 99 n. 56 (App. 29a), while in the other two the present ground was either an alternative basis for decision or, though arguably present, was not discussed by the court. 546 F.2d at 99-100 (App. 29a-30a).

A second and conceptually more important problem is that *Restatement Second* itself makes clear that it does not reach the facts of this case. The Reporter's Note is explicit that an action by a public official may be held preemptive of private remedies and a preclusive effect given to it only where "the interest to be protected is one held by members of the public at large." *Restatement Second* (Tent. Dr. No. 2, 1975), at 68. There is nothing in the *Restatement* rules that would extend preclusion to a case like this where the interest of the carriers, who have underwritten the costs of the airport and its financing, is quite distinct from that of the mem-

bers of the public at large.[9] Indeed the Fifth Circuit recognized this when it said that the pecuniary interest of the CAB airlines

> surpasses the interests possessed by members of the general public or taxpayers. If Southwest directs business away from the new facility, the other airlines will face higher per flight landing charges, which could damage their competitive positions in the Dallas-Fort Worth market. Members of the general public or taxpayers would suffer no corresponding risk because they have assumed no responsibility to finance the airport.

546 F.2d at 98-99 (App. 27a).

Under the *Restatement* analysis, and under sound principles of law, the cities and the Board who brought the first suit can fairly be regarded as representatives of the citizens and taxpayers generally of the Dallas-Fort Worth area. They cannot be regarded as the representatives of the airlines who, unlike the cities and the Board, have a direct and substantial financial stake in whether Southwest is allowed to use Love Field.[10]

An instructive case is *Kersh Lake Drainage District* v. *Johnson*, 309 U.S. 485 (1940). Creditors of a drainage district successfully sued to establish their claim against the district, and then sought to enforce their judgment

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[9] The Reporter for *Restatement Second* had commented that to try to bring the present case within § 85 "would attenuate the concept of representation to a point where it would be as amorphous as 'privity,' and we would be back where we were before." Comment, *The Expanding Scope of the Res Judicata Bar*, 54 TEXAS L. REV. 527, 544 n. 92 (1976). At the Annual Meeting of the American Law Institute on May 18, 1977, the Reporter, Professor Geoffrey C. Hazard, Jr., of the Yale Law School, said of the decision below in the present case: "The decision is wrong."

[10] An affidavit submitted in the District Court shows that the cost to the CAB carriers from landing fees and concession revenues diverted to Love Field is in the range of $1 million per year.

by requiring the district to assess and collect taxes against property owners in the district. One defense unsuccessfully asserted by the district in the enforcement proceeding was that some of the property owners had already fully paid their obligations to the district. This Court ruled unanimously that the district represented all landowners in the litigation on the total collective obligation of the district as an entity, but that even though it attempted to protect the interest of the particular owners who had fully paid, their interest was personal and peculiar to them and they could not be precluded by the district's unsuccessful efforts on their behalf.

In a somewhat different context, this Court has recently noted that when "two distinct interests" are "related but not identical," then "they may not always dictate precisely the same approach to the conduct of litigation," and a union member, who had only one of the interests, was not adequately represented by the Secretary of Labor, who was charged by law with protecting both. *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528 (1972). The financial interest of the CAB carriers in enforcing the phase-out of Love Field service is not the same as the governmental interest that motivated the cities and the Board. The carriers are entitled to be heard in support of their own interest.

The significance of this divergence in interest, in terms of due process, is highlighted by the fact that in the *City of Dallas* case the District Court refused to consider arguments from the cities and the Board about the financial effect of not excluding Southwest from Love Field. It noted that under the Letter Agreements

> the Regional Airport receives the same amount of revenues annually whether Southwest Airlines is there or at Love Field. Any diversion which occurs constitutes, at most, an added cost to the CAB carriers. It does not penalize the Regional Airport Board or the citizens of Dallas and Fort Worth.

371 F.Supp. at 1025 (App. 15d). In *Hansberry* this Court said that due process is violated "in cases where it cannot be said that the procedure adopted fairly insures protection of absent parties who are bound by it." 311 U.S. at 42. In this case no procedure at all was adopted to protect the absent CAB carriers and their interest was explicitly disregarded.

Indeed, even if the airlines could be said to have been represented by the governmental agencies within § 85(d) of the *Restatement*, this case would fall into an established exception to preclusion. Under § 68.1(e)(i) of *Restatement Second* (Tent. Dr. No. 4, 1977), preclusion, though otherwise applicable, does not apply if "[t]here is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on * * * the interests of persons not themselves parties in the initial action * * *." Comment *h* to that section, at 40, says in part:

> There are many instances in which the nature of an action is such that the judgment will have a direct impact on those who are not themselves parties. For example, an agency of government may bring an action for the protection or relief of particular persons or of a broad segment of the public * * *. In such cases, when a second action is brought, due consideration of the interests of persons not themselves before the court in the prior action may justify relitigation of an issue actually litigated and determined in that action.

The state suit is by the only persons with a direct financial interest in the outcome. The financial consequences were deliberately excluded from consideration in the first suit, to which they were not parties. That in itself is a convincing reason to allow these persons to litigate the issue and argue their interest, but the situation is made even more compelling since the District Court refused to

allow joinder of the CAB carriers, even though their joinder would appear to have been required under Civil Rule 19(a) on Southwest's motion explaining the interests of the CAB carriers.

Yet another reason for not precluding the CAB carriers, even if it could be held that they were represented in the first action, is that Southwest never expected the CAB carriers to be bound and was exposed to no unexpected burden by the state court suit. Even as between a single plaintiff and a single defendant, there can be multiple litigation, though preclusion would ordinarily apply, if the "defendant has acquiesced therein." *Restatement Second of Judgments* § 61.2(a) (Tent. Dr. No. 1, 1973). At the outset of the *City of Dallas* case, Southwest repeatedly asserted that any determination in that case would not be binding on the CAB carriers.[11] As late as January 1975, after the *City of Dallas* case had been fully decided and Texas International had begun the state court litigation, Southwest, in a brief in federal court in a related action, said:

> The intervenor-defendants Delta and American were not parties to the original action—either before this Court or the Court of Appeals—and, consequently, are not prevented by principles of res judicata from asserting the validity of the ordinance.

Brief in Support of Plaintiff's Motions for Summary Judgment, at 14, *Southwest Airlines Co.* v. *City of Dallas*, N.D. Tex., C.A. No. 3-74-344-C. It is too late now for Southwest to claim that the CAB carriers were bound after its many representations that they would not be bound.[12]

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[11] *See* p. 6 above at n. 3.

[12] For the same reason, § 111 of *Restatement Second of Judgments* (Tent.Dr. No. 4, 1977) has no application. Southwest cannot contend that it "was reasonably induced to believe that" the CAB carriers "would govern [their] conduct by the judgment in the original action" when it said over and over that they would not be bound by the judgment. *See also* n. 9 at p. 13 above.

In short, the court below incorrectly applied § 85(d) of *Restatement Second* to the facts of this case and overlooked compelling reasons why the CAB carriers should not be precluded in any event. The result falls short of the minimum requirements of due process.

The fact that, as the Fifth Circuit said, "the federal judiciary has never faced the precise question posed by the instant facts," 546 F.2d at 98 (App. 27a), does not mean that the issue presented is so unique, so unlikely to be repeated, that it does not merit the attention of this Court. These exact facts may not be repeated, but questions of preclusion by a judgment to which one was not a party arise every day, both in federal courts and in state courts, to which the due process limitations are also applicable. A commentator has detected in recent decisions

> an alarming judicial tendency to suspend the individual litigant's due process right to a "day in court" in favor of the public's interest in judicial finality, resulting in a dramatic expansion of the scope of the res judicata bar.

Comment, *The Expanding Scope of the Res Judicata Bar*, 54 TEXAS L. REV. 527, 528 (1976). The decision below, if allowed to stand, will give increased impetus to that tendency. If due process of law is to be eroded in favor of what is thought to be judicial efficiency, this Court should say so, and should define the limits to which this development can be taken.

2. Federalism Forsaken

Ever since the Reviser of the Judicial Code persuaded Congress in 1948 to overrule, in 28 U.S.C. § 2283, the decision of this Court in *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118 (1941), it has been clear that a federal court is not barred by the Anti-Injunction Act from staying proceedings in a state court "to protect or ef-

fectuate its judgments." But the fact that a case fits one of the exceptions to the Anti-Injunction Act does not mean that an injunction must, or even should, issue. "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum* v. *Foster*, 407 U.S. 225, 243 (1972).

Thus in *Lamb Enterprises, Inc.* v. *Kiroff*, 549 F.2d 1052 (6th Cir. 1977), it was held that those principles of equity, comity, and federalism made it error for a federal court to enjoin relitigation in a state court of a claim that was arguably barred by a prior federal court judgment. In the *Lamb Enterprises* case, unlike this one, the state court litigation involved precisely the same parties as had the federal court suit that had gone to judgment, and there was not involved there, as there is in the present case, a difficult question of state law on the allocation of power as between municipalities and a state agency. If it was wrong, as the Sixth Circuit held, to enjoin the state proceeding in the *Lamb Enterprises* case, then *a fortiori* it was wrong to enjoin the state court proceedings here.

The decision of the Fifth Circuit in the *City of Dallas* case rested wholly on a question of state law. That court, in an opinion by Judge Thomas Gibbs Gee, held that Texas law gives the TAC power to determine what airport within a city an intrastate carrier may use, and that this power in the Commission overrides any power of a city to make this decision for itself. 494 F.2d at 776-777 (App. 6c-7c). In the District Court in that case, Judge William M. Taylor, Jr., had made a similar determination as one of a number of grounds of decision. 371 F.Supp. at 1030-1031 (App. 25d-26d). Judge Gee and Judge Taylor are highly respected products of the Texas bar, "versed in the idiosyncrasies of Texas

law." *Harris County Commissioners Court* v. *Moore*, 420 U.S. 77, 90 (1975) (dissenting opinion). But as this Court said long ago in another Texas case:

> [W]e should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas.

Railroad Commission of Texas v. *Pullman Co.*, 312 U.S. 496, 499-500 (1941).

If this were a routine diversity case, the "forecast" of state law by a federal court is an acceptable resolution and ought to write an end to that litigation as between the parties to the case. So long as diversity jurisdiction remains, it is workable only if a federal court is deemed competent to determine state law for purposes of a particular case. But a long line of cases recognizes the impropriety of relying on a federal forecast where this would cause "needless conflict with the administration by a state of its own affairs," WRIGHT, FEDERAL COURTS 222 (3d ed. 1976), or, as this Court has formulated it, "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 814 (1976). Here, as in *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 172 (1942), "the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State." Later, in *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 28 (1960), where again the question was whether

state law barred a city from taking certain action, the Court cited the *Fieldcrest Dairies* case for the proposition that "where the issue touched upon the relationship of City to State, * * * we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination." This Court has been particularly mindful of the damage that can be done to state policies by federal courts intervening in a state's systems of regulation such as Texas's systems for regulating air carriers and airports. As was said in *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 334 (1943): "Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts."

The Fifth Circuit finds this line of authority not controlling on the ground that all of those cases "involved truly unsettled questions of state law on internal affairs" and thus "distinguishes them from the instant case in which a Texas Supreme Court ruling, the Texas Constitution, and Texas statutes clearly dictated the federal decision." 546 F.2d at 93 (App. 15a). Perhaps Texas law does in fact give the TAC power to determine what municipal airport an intrastate carrier may use. If so, allowing the state litigation to proceed will confirm the forecast the federal courts have made and end the controversy. But if what seemed clear to the federal courts is not the reading the Texas courts would give to their local law, then the decision in the *City of Dallas* case has interfered with an allocation of function between state agency and city that Texas is entitled to make for itself, and the decision below, enjoining state court litigation, has prevented the petitioners from getting an answer that is authoritative rather than merely a forecast.

The fact is that Texas has two statutes bearing on this dispute, neither of which has ever been construed by any state court on any of the issues this controversy presents. The Texas Aeronautics Commisison Act was first adopted in 1945. It authorizes the TAC to certificate scheduled intrastate carriers, TEX. REV. CIV. STAT. ANN. art. 46c-6, Subdivision 3 (Supp. 1976) (App. 1h-6h), but with regard to airports its only power to "control, administer, and have jurisdiction thereover" is limited to those "donated or given to the state, or to the Texas Aeronautics Commission to be held by it in trust for the state." *Id.*, Subdivision 1 (App. 1h). The Texas Municipal Airports Act was first adopted in 1947. It provides for municipal ownership of airports and allows the municipality "to adopt, amend and repeal such reasonable ordinances, resolutions, rules, regulations and orders as it shall deem necessary for the management, government and use of such airport" so long as they are not "inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established pursuant thereto." TEX. REV. CIV. STAT. ANN. art. 46d-7 (1969) (App. 1i).

If the Aeronautics Commission Act in fact gives the TAC power to authorize an intrastate carrier to use a particular municipal airport, regardless of consent of the municipality, and if the TAC has in fact so authorized Southwest to use Love Field, though neither the certificate of public convenience and necessity nor Minute Order 22 makes any reference to Love Field,[13] then it is apparent from the language last quoted from the Municipal Airports Act that the cities could not interfere with that use. But neither of the Texas statutes says that the TAC has that power. The language in the Aeronautics Commission Act limiting the TAC's jurisdiction over airports to those owned by the state argues strongly against

[13] *See* p. 5 above.

it, as does the language of the Municipal Airports Act giving cities the power to determine "government and use" of their airports.

The only Texas decision even colorably in point is *Texas Aeronautics Commission* v. *Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex. Sup. 1970). That case held that the TAC, not the CAB, has the power to certify intrastate carriers, and that the TAC had not erred in finding that the public convenience and necessity justified certifying Southwest to operate to Dallas. That opinion contains not even a word of obiter on the power of the TAC to compel a city to allow a carrier to use its airport, or on the relationship between the Aeronautics Commission Act and the Municipal Airports Act.

"It may be that the Court of Appeals is correct in its 'forecast,'" *Boehning* v. *Indiana State Employment Ass'n, Inc.*, 423 U.S. 6, 7 (1975), on how the Texas statutes will be construed—but it also may be that it is wrong. Surely it is turning upside down usual principles of equity, comity, and federalism to say that a federal court should use the extraordinary remedy of an injunction to prevent litigation in the state court to find out authoritatively whether the forecast was sound or unsound and to prevent the courts of Texas from determining the meaning of Texas statutes. The fact that this injunction runs against those who were not parties to the litigation in which the forecast was made merely emphasizes the unusual character of what has happened below, and underlines the need for review here.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Fifth Circuit reversed.

Respectfully submitted,

CHARLES ALAN WRIGHT
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Austin, Texas 78705

Attorney for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. ~~76~~-1773

TEXAS INTERNATIONAL AIRLINES, INC.; DELTA AIR LINES, INC.; AMERICAN AIRLINES, INC.; FRONTIER AIRLINES, INC.; OZARK AIR LINES, INC.; EASTERN AIR LINES, INC.; AND CONTINENTAL AIR LINES, INC.,
Petitioners,

v.

SOUTHWEST AIRLINES CO. AND
THE TEXAS AERONAUTICS COMMISSION,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 75-2539

SOUTHWEST AIRLINES COMPANY,
Plaintiff-Appellee,

v.

TEXAS INTERNATIONAL AIRLINES, ET AL.,
Defendants-Appellants,

v.

TEXAS AERONAUTICS COMMISSION,
Intervenor-Appellee.

Jan. 28, 1977

Appeals from the United States District Court for the Northern District of Texas.

Before WISDOM and INGRAHAM, Circuit Judges, and GROOMS,* District Judge.

WISDOM, Circuit Judge:

Southwest Airlines Co. has returned to the federal courts for the second time in two years to preserve a 1973 judgment in a federal district court. The recurring litigation concerns Southwest's right to continue its air passenger services at Love Field in Dallas, Texas, and to avoid a forced move to the new Dallas-Fort Worth Regional Airport. The district court granted Southwest a preliminary injunction against relitigation in state court of the issues decided in 1973. We affirm.

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* Senior District Judge for the Northern District of Alabama, sitting by designation.

I. FACTS

The complicated procedural history, recounted in three previous opinions,[1] deserves brief repetition. The dispute began with a Civil Aeronautics Board order in 1964, requiring the Cities of Dallas and Fort Worth to designate a single airport for CAB-approved service in their region. The cities agreed to construct a new airport midway between them. To carry out the plan, they adopted the 1968 Regional Airport Concurrent Bond Ordinance. Besides authorizing the issuance of revenue bonds, the ordinance provided for a phase-out of commercial passenger air service at Love Field.[2] In 1970 eight CAB-certified air lines, appellants in this case, executed letter agreements with the Dallas/Fort Worth Regional Airport Board agreeing to "move all of [their] certified Air Carrier Services serving the Dallas-Fort Worth area to the [new] airport . . . to the extent required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance." [3]

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[1] *City of Dallas* v. *Southwest Airlines Co.*, N.D.Tex. 1973, 371 F.Supp. 1015, aff'd, 5 Cir. 1974, 494 F.2d 773, *rehearing denied*, 496 F.2d 1407, *cert. denied*, 1974, 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674, *rehearing denied*, 420 U.S. 913, 95 S.Ct. 837, 42 L.Ed. 2d 845; *Southwest Airlines* v. *Texas International Airlines*, N.D. Tex. 1975, 396 F.Supp. 678.

[2] Section 95 of the Ordinance states that the cities:

> . . . shall take such steps as may be necessary, appropriate and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.

[3] The Agreement also required each CAB airline:

> . . . to pay rentals fees and charges for its use, operations and occupancy of the Airport premises and facilities and the services appertaining thereto in an amount which, together with the rentals, fees and charges paid by other Airlines and others using the Airport premises and facilities, will be sufficient to produce total gross revenues required to satisfy the Airport Board's obligation . . .

plus enough money to maintain the facility and to accumulate 1.25 times the debt service requirements on the Regional Airport revenue bonds.

Southwest Airlines began its intrastate commercial air service from Love Field in 1971 under a certificate issued by the Texas Aeronautics Commission (TAC).[4] The certificate authorized service from any airport in the area. On November 12, 1971, however, the TAC ordered all certified airlines not to change airports without written approval from the Commission.[5] After notifying the Regional Airport Board in 1971 of its intention to remain at Love Field, Southwest petitioned the Board for a waiver of the 1968 ordinance. Instead of determining whether the ordinance phase-out provisions applied to the airline, the Board concluded that the original CAB proceedings deprived the Board of jurisdiction.

The cities and the Airport Board then filed the first federal court suit[6] (*Southwest I*), requesting a declaratory judgment of their right to exclude Southwest from Love Field. Southwest counterclaimed for a declaratory judgment of its right to remain at the field and for an injunction to enforce that right. The TAC intervened as a party-defendant and adopted Southwest's position. On both federal and state law grounds,[7] the district

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[4] Because Southwest offers only intrastate service it is not licensed by the CAB, nor subject to CAB jurisdiction. *See City of Dallas* v. *Southwest Airlines Co.*, N.D.Tex. 1973, 371 F.Supp. 1015.

[5] Texas Aeronautics Commission Minute Order No. 22.

[6] *City of Dallas* v. *Southwest Airlines Co.*, N.D.Tex. 1973, 371 F.Supp. 1015, *aff'd*, 5 Cir. 1974, 494 F.2d 773, *rehearing denied*, 496 F.2d 1407, *cert. denied*, 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674, *rehearing denied*, 420 U.S. 913, 95 S.Ct. 837, 42 L.Ed.2d 845.

[7] The district court concluded that the Ordinance, if applicable to Southwest, would violate the federal prohibition "against unjust discrimination and the grant of an exclusive right" of access to

court declared that the cities and the Board could "not lawfully exclude the defendant, Southwest Airlines Co., from the use of Love Field, Dallas, Texas, and its airport facilities so long as Love Field remains open as an airport." *City of Dallas* v. *Southwest Airlines Co.*, N.D. Tex. 1974, 371 F.Supp. 1015, 1035. This Court affirmed the holding, but only on the state law grounds. *City of Dallas* v. *Southwest Airlines Co.*, 5 Cir. 1974, 494 F.2d 773, 776-77.[8]

Dallas responded to the district court's judgment by passing a criminal ordinance that levied a two-hundred-dollar fine for each takeoff or landing at Love Field by an airplane of a certified airline. Southwest then brought another suit in federal court (*Southwest II*) to enjoin enforcement of that ordinance. Braniff intervened as party-plaintiff. *Southwest II* was then consolidated with yet another action brought by Delta and American against Braniff and the cities over violations

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some carriers and not others. 371 F.Supp. at 1026, citing 49 U.S.C. §§ 1110(1), 1718(1), 1349(a). The discrimination resulted from the phase-out provisions in Section 2.1G of the Ordinance, which would have allowed continued service at Love Field by commercial air taxis, unscheduled charters, unscheduled cargo planes, and even intrastate planes of the CAB carriers. 371 F.Supp. at 1027. If Southwest were banned the district court concluded, the ordinance would discriminate even though the CAB carriers had chosen to move all of their services to the Regional Airport. *Id.* at 1028. Furthermore, the district judge found that "the Cities' only reason for barring Southwest Airlines from Love Field is to avoid the potential competitive effect on the regional airport", a violation of "the federal prohibition of the grant of an exclusive right at airports upon which federal funds have been expended". *Id.* at 1029.

The Ordinance violated state law by usurping the power of the TAC. After construing the TAC certification and order as authorization to serve Love Field specifically, the court held that the cities had no authority to order contrary performance. 371 F.Supp. at 1033, *citing* Tex.Const. art. 11, § 5; Vernon's Ann.Tex.Stat. art 46d-7(b) and 1165.

[8] *Southwest Airlines Co.* v. *City of Dallas*, N.D.Tex. 1974, No. CA3-3-74-344-C.

of the 1970 Letter Agreements.[9] After Southwest moved for summary judgment, however, the district court severed the ordinance dispute from the case and enjoined Dallas from enforcing the ordinance against either Southwest or Braniff.[10] The remaining parties then voluntarily dismissed their respective causes of action and refiled them in the state court case that is the object of this suit (*Austin*).[11]

The pleadings in *Austain* raised questions identical with those decided in *Southwest I*. After recounting Southwest's refusal to leave Love Field, Texas International expressed its primary concern that Southwest's continued service at Love Field would put Texas International at a competitive disadvantage. Consequently, the plaintiff alleged:

> A justiciable controversy exists as to the meaning and effect of Southwest's TAC certificate of convenience and necessity and the TAC Minute Order No. 22. The TAC and Southwest contend that under the Texas Aeronautics Act and the Texas Municipal Airports Act (Articles 45c and 45d [sic., 46c and 46d] Vernon's Texas Civil Statutes), the TAC has the statutory authority to adopt orders regulating

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[9] Braniff and Texas International had continued to serve Love Field. Fort Worth brought Texas International into the litigation by a third party complaint.

[10] The district court had assumed the good faith of the City of Dallas in *Southwest I*:

> As this Court is confident that Plaintiffs will abide by its ruling in this case and not attempt to interfere with or burden Southwest's right to use Love Field, an injunction to enforce its decree is deemed unnecessary.

The district court issued the injunction, then, only after Dallas demonstrated that the court had misplaced its confidence.

[11] *Texas International Airlines, Inc.* v. *Dallas-Fort Worth Regional Airport Board*, 200th D.Ct.Tex., No. 227349 (filed Dec. 10, 1974).

and controlling the City of Dallas in the operation of Love Field so as to prevent Dallas from closing Love Field to TAC certificated service without the approval of the TAC and that Southwest's certificate of convenience and necessity and TAC Minute Order No. 22 prohibiting TAC certificated air carriers from changing airports without TAC approval constitute regulatory orders with this effect. The United States District Court for the Northern District of Texas, Dallas Division, and the United States Court of Appeals for the Fifth Circuit have upheld this interpretation of the Texas statutes in an action to which none of the signatory airlines is a party. The judgment in said action is not final, but in any event this interpretation of the Texas statutes is not binding of the courts of Texas. Texas International denies that Southwest's certificate and TAC Minute Order No. 22 have this meaning or effect, but contends that such regulatory orders are void for lack of statutory authority. Alternatively, Texas International contends that such TAC Minute Order is void for lack of notice and hearing.

An attorney for Continental then argued orally before the state court:

> This is [not] an effort to undermine the federal decision. . . . This is a frontal attack on it. The word undermine implies something covert about it. We come in with flags flying.[12]

The federal district court has preliminarily enjoined this "frontal attack", thereby precluding the CAB airlines, the cities, and the airport board:

> from relitigating in state court . . . or in any other court action the validity, effect or enforceability of

[12] *Southwest Airlines Co.* v. *Texas International Airlines, Inc.*, N.D.Tex. 1975, 396 F.Supp. 678, 683, *citing* Defense Exhibit No. 15.

> the 1968 Regional Airport Concurrent Bond Ordinance of the Cities of Dallas and Fort Worth insofar as it may affect the right of plaintiff Southwest Airlines Co. to the continued use and access to Love Field, so long as Love Field remains open. . .[13]

Southwest's right of access to Love Field arises from the declaratory judgment in *Southwest I*, a suit in which the CAB airlines were not parties. But the district court found that Delta, American and Continental had filed amicus briefs with this Court in *Southwest I*. Several of the same attorneys for those parties appeared before the district court in *Southwest II* and before the Texas court in *Austin*.[14] Lawyers for Texas International and Braniff also participated in *Southwest II*, and attorneys for the other CAB lines apparently observed those proceedings.[15] We now face the question whether the judgment in *Southwest I* can support the preliminary injunction against not only the cities and the airport board, the plaintiffs in *Southwest I*, but also the eight CAB carriers.

II. JURISDICTION

The appellants challenge the jurisdiction of the district court by arguing that none of the statutory bases claimed by Southwest should apply. They correctly assert that no diversity of parties exists and that the Anti-injunction Act, 28 U.S.C. § 2283, does not establish an independent basis of jurisdiction. *Tyler* v. *Russell*, 10 Cir. 1969, 410 F.2d 490, 491; *Baines* v. *City of Danville*, 4 Cir. 1964, 337 F.2d 579, 593; *aff'd*, 1966, 384 U.S. 890, 86 S.Ct.

[13] *Id.* at 18.

[14] *Id.* at 5.

[15] *Id.* at 8-9.

1915, 16 L.Ed.2d 966, *rehearing denied*, 385 U.S. 890, 87 S.Ct. 12, 17 L.Ed.2d 121; *Schell* v. *Food Machinery Corp.*, 5 Cir. 1937, 87 F.2d 385, 387, *cert. denied*, 300 U.S. 679, 57 S.Ct. 670, 81 L.Ed. 883. The appellants also deny the existence of federal question jurisdiction because Southwest presents no federal issues that were not litigated in *Southwest I*.

In response, Southwest cites four cases [16] but does not explain any basis for jurisdiction. Although none of the recent cases cited provides an explanation. *Berman* v. *Denver Tramway Corp.*, 10 Cir. 1952, 197 F.2d 946, does suggest that an action for an injunction to enforce a federal judgment is "supplemental" to the original case. *Id.* at 950. Early Supreme Court decisions termed this equity power "ancillary". In *Dugas* v. *American Surety Co.*, 1937, 300 U.S. 414, 57 S.Ct. 515, 81 L.Ed. 720, rehearing denied, 301 U.S. 712, 57 S.Ct. 787, 81 L.Ed. 1365, a federal judgment had relieved the Company of future liability to Dugas. Later, he brought a state court suit that could have contravened the federal judgment. When the company filed a federal action to enjoin the state proceeding, the Supreme Court held that federal jurisdiction extended to the later suit:

> The jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought in a federal court in aid of and to effectuate its prior decree may be carried into execution or that it may be given fuller effect. . . . Such a bill is ancillary and dependent, and therfore the jurisdiction follows that of the original suit, regardless of the citizen-

[16] *International Ass'n of Mach. & Aero Wkrs.* v. *Nix*, 5 Cir. 1975, 512 F.2d 125; *Donelon* v. *New Orleans Terminal Co.*, 5 Cir. 1973, 474 F.2d 1108, *cert. denied*, 414 U.S. 855, 94 S.Ct. 157, 38 L.Ed.2d 105; *Johnson* v. *Redford*, 5 Cir. 1971, 449 F.2d 115; *Berman* v. *Denver Tramway Corp.*, 10 Cir. 1952, 197 F.2d 946.

> ship of the parties to the bill or the amount in controversy.[17]

Without this doctrine, judgments of federal courts would have little effect whenever later circumstances would preclude a party from reestablishing independent jurisdiction. Diversity of citizenship or the jurisdictional amount in controversy could easily change with time. Yet such changes should not enable parties to overturn federal judgments by relitigating issues in state courts. We therefore consider this action as supplemental or ancillary to *Southwest I*, over which the district court properly asserted federal question jurisdiction. A state court judgment in *Austin* could contravene Southwest's rights as defined by the district court in 1973. To effectuate the prior decree, then, the district court had jurisdiction to address the merits of Southwest's claims.

III. FEDERALISM

The appellants argue that the Anti-injunction Act, 28 U.S.C. § 2283,[18] and the judicial doctrine of abstention should preclude an injunction of the *Austin* proceedings.

[17] 300 U.S. at 428, 57 S.Ct. at 521. *See Root* v. *Woolworth*, 1893, 150 U.S. 401, 14 S.Ct. 136, 37 L.Ed. 1123, in which Woolworth sued in equity to enforce an earlier decree quieting title. The Court said:

> The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance, in order to avoid the relitigation of questions once settled between the same parties is settled.

Id. at 411-12, 14 S.Ct. at 139, 37 L.Ed. at 1126. *Hamilton* v. *Nakai*, 9 Cir. 1972, 453 F.2d 152, *cert. denied*, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332, demonstrates the current vitality of this doctrine.

[18] The section states:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Cast in terms of federalism, the argument posits that the district court should have abstained in *Southwest I* to avoid disruption of the internal affairs of the State of Texas. *See Burford* v. *Sun Oil Co.*, 1943, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424, *rehearing denied*, 320 U.S. 214, 63 S.Ct. 1442, 87 L.Ed. 1851; *Barrett* v. *Atlantic Richfield Co.*, 5 Cir. 1971, 444 F.2d 38; *W. S. Ranch Co.* v. *Kaiser Steel Corp.*, 1968, 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835. Because the court should have abstained, the argument continues, *Southwest I* forecasts Texas law on the respective authority of the cities and the TAC to regulate Love Field. *See Chicago* v. *Fieldcrest Dairies, Inc.*, 1942, 316 U.S. 168, 62 S.Ct. 986, 86 L.Ed. 1355; *Railroad Commission* v. *Pullman Co.*, 1941, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971. As only a forecast, the judgment in *Southwest I* should not receive the protection of a federal injunction, the appellants conclude, because the Texas courts should still be able to decide the state law questions. We would preclude such resolution by sustaining the injunction because only Southwest's case can present the peculiar factual clash litigated in *Southwest I* between the cities and the TAC.[19]

To evaluate the appellants' argument, we must apply the principles of federalism to the unusual facts of this case. We begin with the instruction of the Supreme Court that

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[19] The district court injunction applies, quite narrowly, to relitigation of the Love Field controversy only as it affects Southwest. The CAB airlines can continue to litigate their rights to serve Love Field even if the injunction is affirmed. Because the CAB rather than the TAC regulates them, however, they will not be able to present a TAC-City of Dallas clash directly to the Texas courts. Nevertheless another set of facts could present to the Texas courts the question of the relative powers of the TAC and local governments to regulate airports. The district court injunction would not reach such a case as long as the state decision did not attempt to contravene Southwest's rights under the 1973 judgment.

> few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law . . . or the final authority of a state court to interpret doubtful regulatory laws of the state.[20]

We have applied this admonition not only in abstention cases,[21] but also in cases under the Anti-Injunction Act. For instance, *International Association of Machinists and Aerospace Workers* v. *Nix*, 5 Cir. 1975, 512 F.2d 125, noted that the purpose of section 2283 is to "avoid unseemly conflict between the state and federal courts." Congress has decided that frequent injunctions against state proceedings by the federal judiciary would not engender the harmonious relations necessary to the functioning of our federal system.

Whether an "unseemly conflict" disturbs the harmony of the system, however, turns on the facts of each case. Here, we conclude that the preliminary injunction, rather than damaging federal-state relations, would begin to restore the harmony interrupted by the filing of *Austin*. First, Congress has specifically excepted from the ban of section 2283 all injunctions "to protect or effectuate . . . judgments" of the federal judiciary. This unqualified exception recognizes that the states, as well as the federal government, have a responsibility to maintain the harmony we cherish. As we first said in *Jackson-*

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[20] *Railroad Comm'n* v. *Pullman Co.*, 1941, 312 U.S. 496, 500, 61 S.Ct. 643, 645, 85 L.Ed.2d 971, 974, *quoted in Alabama Pub. Serv. Comm'n* v. *Southern Ry. Co.*, 1951, 341 U.S. 341, 350, 71 S.Ct. 762, 95 L.Ed. 1002, 1009.

[21] *E.g.*, *Barrett* v. *Atlantic Richfield Co.*, 5 Cir. 1971, 444 F.2d 38; *Harris* v. *Samuels*, 5 Cir. 1971, 440 F.2d 748, *cert. denied*, 404 U.S. 832, 92 S.Ct. 77, 30 L.Ed.2d 62; *Creel* v. *City of Atlanta*, 5 Cir. 1968, 399 F.2d 777.

ville Blow Pipe v. *Reconstruction Finance Corp.*, 5 Cir. 1957, 244 F.2d 394, 400:

> [N]othing would be as productive of friction between the state and federal courts as to permit a state court to interpret and perhaps to upset such a judgment of a federal court.[22]

Friction is also avoided by an injunction that:

> prevents multiple litigation of the same cause of action and . . . assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review.[23]

These policies support an injunction here, for the appellants have admittedly launched in *Austin* a "frontal attack" on the judgment of the federal court. Furthermore, the preliminary injunction would temporarily thwart the purpose of the assault and thereby guarantee to Southwest the fruits of its victory in *Southwest I.*

Second, the Supreme Court has instructed that abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in . . . exceptional circumstances." *Alleghany County* v. *Frank Mashuda Co.*, 1959, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163, 1166, *see Baggett* v. *Bullitt*, 1964, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed. 377. In other words, before our deference to federalism can justify deviation from routine federal procedures—be they ex-

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[22] *Quoted in International Ass'n of Mach. & Aero. Wkrs.* v. *Nix*, 5 Cir. 1975, 512 F.2d 125, 130.

[23] *Woods Exploration & Prod. Co.* v. *Aluminum Co. of America*, 5 Cir. 1971, 438 F.2d 1286, 1312, *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736.

ercises of jurisdiction or the protection of rights garnered in federal judgments—we must confront a significant disruption of federal-state relations.[24] That a federal court must interpret state law does not by itself threaten such a disturbance.[25] A contrary rule would be stroy diversity jurisdiction and would render obsolete theories of pendent jurisdiction. This Court has therefore followed the instruction of *Harman* v. *Forssenius*, 1965, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50, and *Reetz* v. *Bozanich*, 1970, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68, that courts should refuse to abstain where the issue of state law is clear. *Moreno* v. *Henckel*, 5 Cir. 1970, 431 F.2d 1299, 1308. These decisions are consistent with the numerous cases in which courts have abstained only after deciding that they faced unclear questions of state law.[26]

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[24] *Markham* v. *Allen*, 1946, 326 U.S. 490, 495, 66 S.Ct. 296, 299, 90 L.Ed. 256, 260 (an alien property custodian after World War II raised questions of state probate law in his suit to determine his appropriate share of the decedent's estate).

[25] This case does not fall within the *Pullman* line of cases in which courts have abstained in order to avoid deciding constitutional questions. *Railroad Comm'n* v. *Pullman Co.*, 1941, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971; *see Reetz* v. *Bozanich*, 1970, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68; *Gray Line Motor Tours, Inc.* v. *City of New Orleans*, 5 Cir. 1974, 498 F.2d 293; *Freda* v. *Lavine*, 2 Cir. 1974, 494 F.2d 107; *Harris* v. *Samuels*, 5 Cir. 1971, 440 F.2d 748.

[26] For example in *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 1959, 358 U.S. 639, 79 S.Ct. 455, 3 L.Ed.2d 562, the company challenged a Mississippi tax on public utilities. The state law issue concerned whether the statute applied to the petitioner. After noting that "the state law problems are delicate ones, the resolution of which is not without substantial difficulty," the Court ordered abstention. In *Freda* v. *Levine*, 2 Cir. 1974, 494 F.2d 107, a state regulation on eligibility for Aid to Families with Dependent Children lacked clarity. Consequently, the Court referred the issue to the state before considering the constitutional issues in the case. In *Romero* v. *Coldwell*, 5 Cir. 1972, 455 F.2d 1163, the appellants challenged the selection of Justices of Peace in El Paso County, Texas. The state attorney general had said that the selection process might have violated the state constitution. We ordered abstention in part because of the confused nature of the state law.

In *Southwest I*, however, the federal courts faced an issue of Texas law with a clear answer. The issue concerned the relative authority to the TAC and the City of Dallas to control access to Love Field, and Judge Gee responded:

> It has a simple answer. In a recent decision, the Texas Supreme Court had occasion to consider the powers of the Texas Aeronautics Commission. . . .
>
> "The decision as to where the public interest lies and what air service is best for Texas must be made by the Texas Aeronautics Commission." . . .
>
> . . . Indeed, to hold that a city could deny the use of public facilities to an airline certificated to it by the Texas Aeronautics Commission would cripple, if not destroy, the Commission's powers to control intrastate routes.

City of Dallas v. *Southwest Airlines*, 5 Cir. 1974, 494 F.2d 773, 776-77, *quoting Texas Aeronautics Commission* v. *Braniff Airways, Inc.*, Tex. Sup. Ct. 1970, 454 S.W.2d 199, *cert. denied*, 400 U.S. 943, 91 S.Ct. 244, 27 L.Ed.2d 247. As both the district and circuit opinions explain, to rule otherwise would disregard the plain language of the Texas Constitution, the Texas Municipal Airports Act, the Texas Aeronautics Act, and statutes regulating home rule cities, all of which support TAC authority over the controversy. 494 F.2d at 777; 371 F.Supp. at 1032-34. Because the state law is so clear, the federal courts did not violate any principles of federalism by proceeding to judgment without abstention in *Southwest I*.

Third, the appellants also submit that the earlier case breached federalism policy in that the federal courts decided a state law question bearing upon internal state affairs. The carriers cite the line of cases following *Burford* v. *Sun Oil Co.*, 1943, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424, to support the proposition. Al-

though this Court has followed *Burford*, *e.g.*, *Barrett* v. *Atlantic Richfield Co.*, 5 Cir. 1971, 444 F.2d 38, its doctrine does not apply in this case. To begin with, all of the cases cited by appellants involved truly unsettled questions of state law on internal affairs.[27] This distinguishes them from the instant case in which a Texas Supreme Court ruling, the Texas Constitution, and Texas statutes clearly dictated the federal decision. Furthermore, the decision in *Southwest I* did not disrupt the harmonious relations between the state and federal governments; the state agencies themselves requested the federal decision. The cities, not Southwest, brought the federal suit. The TAC intervened voluntarily in the ac-

[27] *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 1959, 358 U.S. 639, 79 S.Ct. 455, 3 L.Ed.2d 562, concerned the constitutionality of a tax statute under an ancient, rarely used state constitutional provision. In *United Gas Pipeline Co.* v. *Ideal Cement Co.*, 1962, 369 U.S. 134, 82 S.Ct. 676, 7 L.Ed.2d 623, the Louisiana License Code provision under which the state taxed national gas sales had not been construed by a state court. *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 1968, 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835, posed the "truly novel" question of the meaning of the term "public use" in the New Mexico Constitution's eminent domain provision. 391 U.S. at 594, 88 S.Ct. 1753. This Court held in *Romero* v. *Coldwell*, 5 Cir. 1972, 455 F.2d 1163, 1165:

> [A]ppellants contend that each justice of the peace has county-wide jurisdiction, and they acknowledge that this is the linchpin of their case. It appears that this is a question that is neither settled nor clear under Texas law.

And we also noted in *Barrett* v. *Atlantic Richfield Co.*, 5 Cir. 1971, 444 F.2d 38, 42, that no Texas court had ever attempted to reconcile conflicting claims for different minerals on the same land and that the legislature had not provided a solution either.

> We must also reject appellants' attempt to apply *Louisiana Power & Light Co.* v. *Thibodaux*, 1959, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058, *rehearing denied*, 360 U.S. 940, 79 S.Ct. 1442, 3 L.Ed.2d 1552, to the *Southwest* facts. Again the Court considered the law truly unsettled. *Id.* at 30, 79 S.Ct. 1070. Only through the specious legal argument of the appellants can Texas law on the comparative authority of the cities and the TAC be considered unclear. We have rejected that argument repeatedly and also reject their corollary use of *Thibodaux*.

tion. No agency raised the issue of abstention.[28] Even if the question of comparative authority had been less clear, it cannot be said that a federal court disrupts harmonious relations with a state by responding to a request by the bickering state agencies to resolve their dispute.

In summary, then, an injunction to protect Southwest's federal judgment will not disrupt policies of federalism. The district court correctly declined to abstain in *Southwest I*. Abstention would not have been an appropriate response to the invocation by the state agencies themselves of federal court jurisdiction to resolve what turned out to be a clear question of state law. Because the original holding violated no principle of federalism, it deserves the protection of the federal chancellor. These facts reveal only one disruption of state-federal relations —the filing of *Austin* by the CAB carriers. Enjoining the state proceeding therefore removes, rather than exacerbates, discord between the sovereigns.[29]

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[28] Had the cities wanted a state court determination, they could have brought a suit in the Texas courts on both the federal and state grounds. If Southwest had then removed the case to federal court, the cities could have asked for abstention. Similarly, the TAC could have raised the abstention question after intervening.

[29] Preventing this affront to the federal judgment will not preclude Texas courts from addressing the legal issues that underlie this dispute. *See* footnote 19. Under *Pullman* and its progeny, the resolution of legal issues in *Southwest I* does not bind the Texas judiciary on those questions of law. In this case, we hold only that the CAB carriers cannot assail a federal judgment by relitigation in state courts. If the Texas courts or legislature should establish legal rules incongruous with the legal principles that controlled *Southwest I*, then relief from the federal judgment may be justified under Rule 60(b) of the Federal Rules of Civil Procedure. *See Glenn* v. *Field Packing Co.*, 1933, 290 U.S. 177, 54 S.Ct. 138, 78 L.Ed. 252; *Oliver* v. *Monsanto Co.*, S.D.Tex. 1972, 56 F.R.D. 370, *aff'd.*, 5 Cir. 1973, 487 F.2d 514; 7 Moore's Federal Practice ¶ 60.26[4] (1971); C. Wright and A. Miller, 11 Federal Practice and Procedure § 2283 (1973). Of course, we do not reach the 60(b) question today. But we do suggest that by allowing the federal courts to determine the continuing effectiveness of their judgments, the Rule provides an approach more consistent with the above policies of federalism than the "frontal attack" launched by the CAB carriers in *Austin*.

IV. PRECLUSION

An injunction to protect a federal judgment can restrain only those bound by the judgment.[30] Because the CAB airlines did not appear as parties in *Southwest I*, they now argue that the holding of that case cannot preclude them from relitigating issues there decided. They present the question whether the 1968 ordinance can be enforced by private parties against Southwest after a federal court has held public enforcement of the ordinance invalid.

A. CHOICE OF LAW

Federal law of res judicata controls this case. Even though the holding of *Southwest I* relied on state law, the effect of the case on parties and nonparties presents a question of federal law distinct from the local issues decided. This conclusion is consistent with *Aerojet-General Corp.* v. *Askew*, 5 Cir. 1975, 511 F.2d 710, 715-718, *rehearing denied*, 514 F.2d 1072, *cert. denied* 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137, in which the Court held that the res judicata effect of a diversity judgment also depended upon federal law. *Aerojet* stressed the importance of preserving rights generated by federal judgments:

> If state courts could eradicate the force and effect of federal court judgments through supervening inter-

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[30] The term "preclusion" denotes the principle of res judicata. Section 2283 cases have traditionally sustained injunctions only against parties bound by a judgment in a res judicata sense. *E.g. International Ass'n of Mach. & Aero. Wrkrs.* v. *Nix*, 5 Cir. 1975, 512 F.2d 125 (a party to the first action was bound by the judgment therein); *Donelon* v. *New Orleans Terminal Co.*, 5 Cir. 1973, 474 F.2d 1108 (a party to the first action was bound by the judgment therein); *Johnson* v. *Radford*, 5 Cir. 1971, 449 F.2d 115 (heirs of party to first suit were considered "in privity" with the deceased and therefore bound by the first suit); 1B Moore's Federal Practice ¶ 0.408[2], [3] (1965).

> pretations of the state law of res judicata, federal courts would not be a reliable forum for final adjudication of a diversity litigant's claims.[31]

This reasoning applies *a fortiori* in a non-diversity setting where the *Erie* doctrine has even less force than in *Aerojet*.

B. BACKGROUND

The principle of res judicata serves several policies important to our judicial system. By declaring an end to litigation, the doctrine adds certainty and stability to social institutions.[32] This certainty in turn generates public respect for the courts.[33] By preventing relitigation of issues, res judicata conserves judicial time and resources.[34] It also supports several private interests, including avoidance of substantial litigation expenses,[35] protection from harassment or coercion by lawsuit,[36] and avoidance of conflicting rights and duties from inconsistent judgments.[37]

Recognizing the importance of these policies, federal courts have repeatedly held that judgments can bind persons not party to the litigation in question. *Chicago,*

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[31] *Aerojet-General Corp.* v. *Askew*, 5 Cir. 1975, 511 F.2d 710, 716.

[32] Semmell, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 Colum.L.Rev. 1457 (1968); Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 Calif.L.Rev. 1098 (1968).

[33] Comment, *supra* note 32, at 1099.

[34] Semmell, *supra* note 32, at 1457; Vestal, *Res Judicata Preclusion: Expansion*, 47 So.Cal.L.Rev. 357, 379 (1974); Comment, *supra* note 32, at 1099.

[35] Semmell, *supra* note 32, at 1457.

[36] Comment, *supra* note 32, at 1099.

[37] *Id.* at 1098, 1105.

Rock Island & Pacific Railway Co. v. *Schendel*, 1926, 270 U.S. 611, 46 S.Ct. 420, 70 L.Ed. 757; *Heckman* v. *United States*, 1912, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820; *Aerojet-General Corp.* v. *Askew*, 5 Cir. 1975, 511 F.2d 710; *Dudley* v. *Smith*, 5 Cir. 1974, 504 F.2d 979, *rehearing denied*, 1975, 507 F.2d 1280; *Astron Industrial Associates, Inc.* v. *Chrysler Motors Corp.*, 5 Cir. 1968, 405 F.2d 958. At common law this preclusive effect extended only to those in privity with the parties. 1B Moore's Federal Practice ¶ 0.411[1] (1965). But federal cases have recognized that "privity" denotes a legal conclusion rather than a judgmental process.[38] Professor Vestal has explained:

> Thus, the term privity in itself does not state a reason for either including or excluding a person from the binding effect of a prior judgment, but rather it represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion.[39]

Federal courts have deemed several types of relationships "sufficiently close" to justify preclusion. First, a non-party who has succeeded to a party's interest in property is bound by any prior judgments against the party. *Golden State Bottling Co.* v. *NLRB*, 1973, 414 U.S. 168, 179, 94 S.Ct. 414, 38 L.Ed.2d 388; *United*

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[38] Judge Prettyman found the concept elusive and concluded:

> It is sufficient that the word designates a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.

Jefferson School of Social Science v. *Subversive Activities Control Brd.*, 1963, 118 U.S.App.D.C. 2, 331 F.2d 76; *accord, Bruszewski* v. *United States*, 3 Cir. 1950, 181 F.2d 419, 423, (Goodrich, J., concurring) *cert. denied*, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632.

[39] Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L.Rev. 27 (1964).

States v. *New York Terminal Warehouse Co.*, 5 Cir. 1956, 233 F.2d 238, 241. Second, a non-party who controlled the original suit will be bound by the resulting judgment. *Dudley* v. *Smith*, 5 Cir. 1974, 504 F.2d 979 (president and sole shareholder controls his corporation); *Kreager* v. *General Electric Co.*, 2 Cir. 1974, 497 F.2d 468, *cert. denied*, 419 U.S. 861, 95 S.Ct. 111, 42 L.Ed.2d 95-96; *rehearing denied*, 419 U.S. 1041, 95 S.Ct. 530, 42 L.Ed.2d 319 (president and sole shareholder controls his corporation); *Astron Industrial Associates, Inc.* v. *Chrysler Motors Corp.*, 5 Cir. 1968, 405 F.2d 958 (parent corporation controls subsidiary). Third, federal courts will bind a non-party whose interests were represented adequately by a party in the original suit.[40] *Heckman* v. *United States*, 1912, 224 U.S. 413, 445-46, 32 S.Ct. 424, 434-35, 56 L.Ed. 820 (United States represents interests of American Indians); *Kerrison* v. *Stewart*, 1876, 93 U.S. 155, 160, 23 L.Ed. 843, 845 (trustee represents interests of beneficiaries); *Aerojet-General Corp.* v. *Askew*, 5 Cir. 1975, 511 F.2d 710 (state represents interests of a home-rule county); *Berman* v. *Denver Tramway Corp.*, 10 Cir. 1952, 197 F.2d 946 (local government represents interests of the public).

Because res judicata denies a non-party his day in court, the due process clauses prevent preclusion when the relationship between the party and non-party becomes too attenuated. *Hansberry* v. *Lee*, 1940, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22; *cited with approval*, *Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 1971, 402 U.S. 313, 329, 91 S.Ct. 1434, 28 L.Ed.2d 788. Although *Hansberry* involved a class action suit, its due process principles also control res judicata cases. In *Humphreys* v. *Tann*, 6 Cir. 1973, 487 F.2d 666, *cert.*

[40] Common law principles of res judicata classified many of these cases under the label of concurrent interest privity. The federal decisions have correctly disregarded the label and analyzed the representative relationship between the parties. *See* part IV E.

denied, 1974, 416 U.S. 956, 94 S.Ct. 1970, 40 L.Ed.2d 307, for instance, the Court permitted a plaintiff to sue the owner of an airplane involved in a mid-air collision even though an earlier suit had relieved the owner of liability. The first suit, to which the plaintiff was not a party, was not a class action. Even though the attorney for the plaintiff had participated in pretrial discovery and litigation conferences for the first trial, the Court of Appeals for the Sixth Circuit permitted him a separate day in court to try *his* theory of liability. *Id.* at 667, 671. The *Southwest* litigation also raises questions of both res judicata and due process.

C. PRIVITY BY LETTER AGREEMENT

The district court decided to bind the CAB airlines by *Southwest I* in part because it found in the Letter Agreements a contractual privity between the airlines and Dallas. Although the opinion does not specify the nature of this privity, the concurrent rights established in the new airport by the Letter Agreements apparently form the basis of the relationship. Concurrent privity between private persons, as a legal principle, is well established at common law,[41] but it does not apply to the facts before us. Section 85 of the *Restatement of the Law Second-Judgments* (tentative draft No. 2, 1975)[42] identifies the

[41] 1B Moore's Federal Practice ¶ 0.411[12] (1965). *See Kersh Lake Dist.* v. *Johnson* (1940) 309 U.S. 485, 60 S.Ct. 640, 84 L.Ed. 881 (trustee under mortgage and deed of trust has concurrent interest in property with a secured bond holder); *McCrocklin* v. *Fowler*, E.D.Wisc. 1968, 285 F.Supp. 41, *aff'd.* 7 Cir. 1969, 411 F.2d 580 (administrator of an estate has concurrent interest with a beneficiary).

[42] Section 85 states:

> (1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of the rules of res judicata as though he were party. A person is represented by a party who is:

[Footnote continued on page 22a]

contractual and representative essence of the doctrine. The party trustee or administrator or executor in the suit represents the non-party bondholder or beneficiary, who is to be bound by the judgment against the party. The lessor-lessee nexus created by the Letter Agreements is not included in the list of private representative relationships requiring preclusion.[43] Its absence results from the nature of most lessor-lessee agreements, which do not inherently provide a representative role to either party.[44] The CAB agreements do not indicate any in-

[42] [Continued]

(a) The trustee of an estate or interest of which the person is a beneficiary; or

(b) Invested by the person with authority to represent him in an action; or

(c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or

(d) An official or agency invested by law with authority to represent the person's interests; or

(e) The representative of a class or persons similarly situated, designated as such with the approval of the court, of which the person is a member.

(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.

[43] Furthermore, theories of successive relationships in the same property rights do not establish privity here; Dallas and CAB lines executed the Letter Agreements *before*, not after the judgment in *Southwest I. Radio Corp.* v. *Radio Eng. Lab.*, 1934, 293 U.S. 1, 54, S.Ct. 752, 79 L.Ed. 163, *rehearing denied*, 293 U.S. 522, 55 S.Ct. 66, 79 L.Ed. 634; *see Kruger & Birch, Inc.* v. *Du Boyce*, 3 Cir. 1957, 241 F.2d 849, 854 (lessee held in privity with lessor as to issue litigated *before* the lease); 1B Moore's Federal Practice ¶ 0.411[1] nn. 13-20 (1965); 46 Am. Jur.2d § 533 (1969).

[44] As the comment to Section 85 suggests, the private representative role is extended only to those whom the parties intended, either expressly or impliedly, to exercise it:

> The method of designating the representative may be adjudicative or contractual . . . . In any case, however, the effect is to confer on the representative the requisite authority, and generally exclusive authority, to participate as a party on behalf of the represented person.

tent to the contrary, as the signatories limited discussion to the scope and cost of the airport, use of it by the airlines, and rental charges. Consequently, the Letter Agreements do not create private contractual privity between Dallas and the CAB carriers.

D. VIRTUAL REPRESENTATION

Southwest and the district court, citing *Aerojet*,[45] partly rely on the doctrine of virtual representation to bind the CAB airlines. This doctrine offers little analytical assistance here because of its wide and inconsistent application. In *Aerojet* most of the cases cited represent factual settings with little relevance to the Southwest dispute because they involved only private parties: estate beneficiaries bound by administrators,[46] presidents and sole stockholders by their companies,[47] parent corporations by their subsidiaries,[48] and a trust beneficiary by the trustee.[49] In fact, the doctrine closely resembles the theory of concurrent privity which our Court, as noted, has rejected. Although Southwest argues that the representation of private interests by gov-

[45] 511 F.2d at 719.

[46] *Chicago R. I. & P. Ry. Co.* v. *Schendel*, 1926, 270 U.S. 611, 46 S.Ct. 420, 70 L.Ed. 757; *Robison* v. *Sidebotham*, 9 Cir. 1957, 243 F.2d 16, *cert. denied*, 355 U.S. 867, 78 S.Ct. 115, 2 L.Ed.2d 74.

[47] *Dudley* v. *Smith*, 5 Cir. 1974, 504 F.2d 979; *Kreager* v. *General Electric Co.*, 2 Cir. 1974, 497 F.2d 468.

[48] *Pan American Match, Inc.* v. *Sears, Roebuck and Co.*, 1 Cir. 1972, 454 F.2d 871, *cert. denied*, 409 U.S. 892, 93 S.Ct. 113, 34 L.Ed. 2d 149; *Astron Indus. Associates, Inc.* v. *Chrysler Motors Corp.*, 5 Cir. 1968, 405 F.2d 958.

[49] *Kerrison* v. *Stewart*, 1876, 93 U.S. 155, 23 L.Ed. 843. One cited case did involve representation by a government. *Heckman* v. *United States*, 1912, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820. The res judicata effect was a function of the substantive federal law on the relationship between the federal government and American Indians.

ernment agencies comprises one branch of the doctrine, the proposition bears little relation to the primary question about the propriety of barring the private interests from relitigation.[50] Federal case law requires that we direct our analysis toward answering that specific question, rather than toward identifying the doctrinal scope of virtual representation.[51] Consequently, we turn to the relationship between the government agency that litigated *Southwest I* and the private parties that would relitigate the same issues in *Austin*.

E. REPRESENTATION BY GOVERNMENT AUTHORITIES

In their attempt to apply the 1968 Bond Ordinance to Southwest, the CAB airlines assume the role of private attorneys-general. In effect, they would enforce

[50] The importance of the proposition diminishes further because of the confusion surrounding the doctrine. Although in one Texas case courts expressly involved the theory to bar private parties from relitigating issues already decided in a government suit, *Cochran County* v. *Boyd*, Tex.Civ.App. 1930, 26 S.W.2d 364, other Texas cases analyze similar situations without reference to the doctrine. *Hovey* v. *Shepard*, 1912, 105 Tex. 237, 147 S.W. 224; *City of Palestine* v. *City of Houston*, Tex.Civ.App. 1924, 262 S.W. 215. The commentators also do not agree on the essence of the doctrine. One has stressed the special legal relationships that traditionally have existed between the party and the represented non-party. Comment, *The Expanding Scope of the Res Judicata Bar*, 54 Tex.L.Rev. 527 (1976). Another has emphasized the element of necessity, which requires the application of res judicata when non-parties could not possibly have been joined in the original action. Comment, *Non-Parties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 Calif.L.Rev. 1098 (1968), *citing* Restatement of Judgments § 87 (1942).

[51] *See Battle* v. *Cherry*, N.D.Ga. 1972, 339 F.Supp. 186, holding that a suit by a school board to enforce a state educational program binds taxpayers and parents of school children. *See also Smith* v. *Illinois Bell Tel. Co.*, 1926, 270 U.S. 587, 46 S.Ct. 408, 70 L.Ed. 747; *In Re Engelhard & Sons Co.*, 1914, 231 U.S. 646, 34 S.Ct. 258, 58 L.Ed. 416, both involving the representative capacity of a public utility.

the ordinance's phase-out provision by excluding Southwest from Love Field. The City of Dallas has already failed in its attempt to effect such an exclusion. We hold that the carriers should be bound by that failure.

As noted above, res judicata does not follow here from concurrent privity or the theory of virtual representation. Successive privity does not apply, because the carriers did not succeed to the interests of Dallas at Love Field. Nor did the airlines in any sense control the litigation in *Southwest I*. On the facts of this case, however, res judicata applies because Dallas, as a government, represented in *Southwest I* the only legal interests the airlines possess regarding the enforcement of the 1968 ordinance against Southwest. In other words, the relationship between the city as public enforcer of the ordinance and the airlines as private enforcers is close enough to preclude relitigation.

Although the doctrine of "virtual representation" seems cloudy, the proposition that governments may represent private interests in litigation, precluding relitigation, is clear. In *Berman* v. *Denver Tramway Corp.*, 10 Cir. 1952, 197 F.2d 946, for instance, a citizen and taxpayer could not challenge the tramway fares once the city had already lost a suit on the issue.[52] Similarly in *Battle* v. *Cherry*, N.D. Ga. 1972, 339 F.Supp. 186, the court refused to allow parents to enforce a state law once their school board had already failed to achieve

[52] In *Berman* the court cited in *Re Engelhard & Sons Co.*, 1914, 231 U.S. 646, 34 S.Ct. 258, 58 L.Ed. 416. That was a case in which the Supreme Court refused to allow a private party to intervene in a suit between a city and the local telephone company. The Court assumed that the city would vigorously pursue the action and would therefore adequately represent both the public and the subscribers to phone service. Although this case does not identify the type of relationship necessary for res judicata, it does deny a day in court both to members of the public and to private persons with pecuniary interests in the dispute.

enforcement.[53] On the other hand, this Court has recently held that litigation by a government agency will not preclude a private party from vindicating a wrong that arises from related facts but generates a distinct, individual cause of action. In *Rodriguez* v. *East Texas Motor Freight*, 5 Cir. 1974, 505 F.2d 40, *cert. granted*, 1976, 425 U.S. 990, 96 S.Ct. 2200, 48 L.Ed.2d 814, Mexican-American drivers charged their employer with job discrimination in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and 42 U.S.C. § 1981. Before the termination of that suit, the United States challenged similar discrimination in a nation-wide "pattern and practice" suit and procured a consent decree with guidelines for future hiring and optional remedies for individual workers. 505 F.2d at 65. The individual remedies, however, were not complete and did not consider the specific discrimination against any employee. The government therefore could not assure that the general, nationwide remedies could actually vindicate the damage suffered by individuals. This Court allowed the individual plaintiffs to continue their private actions. As the leading case in support of the decision, *Williamson* v. *Bethlehem Steel Corp.*, 2 Cir. 1972, 468 F.2d 1201, *cert. denied*, 1973, 411 U.S. 931, 93 S.Ct. 1893, 36 L. Ed.2d 390, reasoned, the Civil Rights Act intended to bestow on individual employees legal rights distinct from the more general public interests vindicated by government suits. Employers therefore may be subject to liability for violation of legal duties owed the public as well as for violation of distinct legal duties owed individual employees. Furthermore, to correct the indi-

[53] Several states have adopted similar positions, including Texas, where citizens could not sue to prevent a railroad from moving its facilities once their city had already lost an identical suit. *See Holvey* v. *Shepard*, 1912, 105 Tex. 237, 147 S.W. 224, *cited with approval*, *City of Palestine* v. *City of Houston*, Tex.Civ.App. 1924, 262 S.W. 215, holding that a city could properly represent its citizens' interests in litigation over the movement of railroad facilities.

vidual injustices, the statutory scheme contemplates private remedies different from those available to the Justice Department.

Despite these cases, the federal judiciary has never faced the precise question posed by the instant facts. The CAB carriers correctly distinguish *Berman* by arguing that their pecuniary interest in the success of the new airport, surpasses the interests possessed by members of the general public or taxpayers. If Southwest directs business away from the new facility, the other airlines will face higher per flight landing charges, which could damage their competitive positions in the Dallas-Fort Worth market. Members of the general public or taxpayers would suffer no corresponding risk because they have assumed no responsibility to finance the airport. On the other hand, Southwest is on sound ground in arguing that the CAB carriers have not suffered a private legal wrong independent from the violation of the ordinance. Consequently, their condition differs from that of the job discrimination victims who could claim that under the Civil Rights Acts the employers had breached legal duties owed specifically to them, not just to the general public. Furthermore, in *Rodriguez* and *Williamson* the workers claimed remedies distinct from the relief imposed in the government litigation. In the *Southwest* case, however, the CAB airlines attempt only to exclude Southwest from Love Field, the remedy already denied the City of Dallas. The carriers do not claim any other recovery from Southwest because Southwest owes no legal duty apart from the general responsibility to obey valid public ordinances. So this case falls between *Berman* and *Rodriguez*, and requires us to refine the preclusive effect of government litigation.[54]

[54] Despite the urging of the appellants, *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County*, 5 Cir. 1970, 425 F.2d 1141, *cert. denied*, 400 U.S. 805, 91 S.Ct. 12, 27 L.Ed.2d 35, cannot assist in the refinement. In *Elliott* a private plaintiff challenged the consti-

The American Law Institute has recently completed such a refinement in its Restatement of the Law Second-Judgments § 85 (tentative draft No. 2, 1975). The comment to subsection 85d analyzed representation by public officials through three categories. First, it recognizes that private suits to vindicate public interests raise standing issues. Second, it establishes a category of cases in which "an agency's authority to maintain or defend litigation . . . should be construed as preempting the otherwise available opportunity of the individual or members of the public to prosecute. . . ." Third, it recognizes cases such as *Williamson* in which "remedies that a public official is empowered to pursue may be interpreted as being supplemental to those which private persons may pursue themselves. In that circumstance, the official's maintenance of an action does not preclude other litigation by the persons affected."

The reporter's note on subsection 85d includes no federal cases in support of the second category,[55] and most

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tutionality of a city ordinance after another private litigant had lost a similar challenge. The question was whether in the first suit the *private litigant* had represented the interests of the later challenger. Representation by a government authority never came up because both of the private parties *opposed* the city. As a result, the case has no bearing on the *Southwest* litigation, in which the later private litigants support, not oppose, the government position thereby raising the question of whether the government represented their interests in the earlier suit.

[55] The reporter did cite *Patterson* v. *Burns*, D.Haw. 1971, 327 F.Supp. 745, as precedent against preclusion in category two cases. In that case the court permitted a private citizen to challenge the appointment of a senator to fill a vacancy even though the lieutenant governor had previously challenged the appointment. Because of its unusual facts, however, the case differs from the others in the category. The lieutenant governor had not adequately represented the private litigant because he merely tested a state law interpretation of his election rules. The private citizen, on the other hand, claimed that the appointment violated his constitutional right to equal protection of the laws, an issue never raised in the

of the state cases do not present facts analogous to the case at hand.[56] In *Rynsburger* v. *Dairymen's Fertilizer Cooperative, Inc.*, Ct. of App. 1968, 266 Cal. App. 2d 269, 72 Cal. Rptr. 102, however, the court precluded landowners from litigating a nuisance action similar to one prosecuted by the public authorities. The landowners alleged individual harms to their property and could have argued that the nuisance statutes established a scheme to protect both their rights and public interest. After concluding that the landowners had advanced a public nuisance theory of recovery, however, the court bound them to the previous judgment on the same theory.[57] Again, in *Town of Burnsville* v. *City of Bloomington*, 1962, 264 Minn. 133, 117 N.W.2d 746, the litigation of the validity of an annexation by a municipality barred the affected landowners from trying a similar case. *Id.* at 754. Although the court did not discuss the difference between the landowners and the general public, the landowners could have argued that including

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first suit. *Patterson* therefore cannot apply to the *Southwest* case in which the private litigant raises precisely the same legal claim litigated by the public agency.

[56] In *Stuart* v. *Winslow Elementary School Dist. No. 1*, 1966, 100 Ariz. 375, 414 P.2d 976; and *Greene* v. *Art Institute of Chicago*, 1957, 16 Ill.App.2d 84, 147 N.E.2d 415, *cert. denied*, 1958, 358 U.S. 838, 79 S.Ct. 62, 3 L.Ed.2d 74, members of the public were precluded from relitigating issues previously tried by public authorities. Because the private parties claimed no interest in the outcome besides their interests as citizens and taxpayers, perhaps they lacked standing to sue. See 147 N.E.2d at 418. Viewed in this manner, *Berman* may be properly classified in class one rather than class two.

[57] In *Rynsburger* the court also supported preclusion by a modified class action analysis. The earlier suit by the public authority included other landowners as plaintiffs. Thus, the later plaintiffs were represented in the first action not only by the government but also by similarly situated landowners. In *Southwest I*, several of the CAB airlines also participated, but only by filing amicus briefs.

their property in a jurisdiction with higher taxes and different municipal services inflicted a special pecuniary injury not experienced by the public. Yet the state court refused to permit them a day in court. Consequently, under the Restatement Second system of preclusion, a private party must show more than a special pecuniary interest when attempting to vindicate the breach of a public duty already litigated by a government agency. Permission to relitigate appears reserved for the private plaintiff who would vindicate a breach of duty owed specifically to the plaintiff or who would recover under a "statutory system of remedies [that] may contemplate enforcement of private interests both by a public agency and the affected private parties." Restatement of the Law Second-Judgments § 85 (1975) (Reporter's Note to comment d).

To apply the *Restatement* categories to this case, the standing of the CAB carriers to sue Southwest has not been challenged. The issue before us is whether the case falls within category two, in which government litigation precludes private relitigation or category three, in which the relitigation could occur. The facts here best fit the second category of the *Restatement*. First, the CAB carriers do not claim a breach of legal duty by Southwest, apart from the alleged violation of the general duty to obey valid ordinances. Second, the carriers request the same remedy denied the City of Dallas, namely the enforcement of the phase-out provision of the ordinance to exclude Southwest from Love Field. Third, the ordinance does not establish a statutory scheme looking toward private enforcement of its requirements. Because legal interests of the carriers do not differ from those of Dallas in *Southwest I*, we hold that they received adequate representation in the earlier

litigation and should be bound by the judgment in that litigation.[58]

We have adopted the *Restatement* approach because it promotes the policies of res judicata in this factual setting. To allow relitigation by any private litigant with a pecuniary interest in the success of the new airport would open the door to recurrent, burdensome litigation. Besides the CAB carriers, all of the individuals and companies that provide goods and services at the new airport have a pecuniary interest, distinct from that of the general public, not only in the ultimate survival of the facility, but also in the volume of air traffic attracted to the airport. More planes means more passengers, more sales, more jobs, more profits for all of the businesses involved. Furthermore, a pecuniary interest could be claimed by investors, developers, hotels, restaurants, and other retail interests attracted to the vicinity by the new facility. Even the businesses at or near Love Field could claim a similar, although converse, interest. To allow relitigation by all of these parties would surely defeat the res judicata policies identified above. First, it would add uncertainty to the status not only of Southwest but also of the other businesses and government operations. If courts could second guess another court each time a new litigant, dissatisfied with

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[58] The appellants argue that the interests of Dallas and the CAB carriers differ over whether Love Field should close. They submit that Dallas prefers to retain commercial service at Love Field as a convenience to its citizens, whereas the carriers prefer closing Love Field. The argument lacks force because it does not examine the congruence of their legal interests. Both Dallas and the carriers are attempting to enforce the ordinance and to overturn TAC authority over intrastate air services, thereby giving Dallas control of access to Love Field. Furthermore, the argument neglects the presence of Fort Worth and the Airport Board as Dallas's coparties in *Southwest I*. The alliance of the two cities and the Board indicates the frivolity of the suggestion that the representation by these government authorities somehow betrayed the carriers' interest in the success of the new airport.

the previous judgment, filed a new complaint, the respect of the previous parties or of the public toward the courts would inevitably decrease. Third, relitigation would continue to waste judicial resources and time, as it has already in the three post-judgment suits in this controversy. Fourth, Southwest and subsequent litigants would suffer the harassment and expense of still later lawsuits, as well as the possibility of numerous conflicting judgments. Although these horrors may not occur, we see no reasoned basis on which to distinguish the CAB airlines from numerous parties with pecuniary interests in the Southwest controversy. We can best support the public interest by applying the *Restatement's* approach to preclude relitigation by all persons, including the carriers, who claim nothing more than a pecuniary interest in the dispute.

F. DUE PROCESS

Appellants submit that binding them by the judgment in *Southwest I* violates due process of law because it denies them a day in court. Their argument arises from the landmark case of *Hansberry* v. *Lee*, 1940, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 [59] in which the Court addressed the preclusive effect of a class action suit. The original suit in *Hansberry* upheld the validity of a racially restrictive covenant in a series of property deeds. The covenant's validity depended upon whether the owners of ninety-five per cent of the frontage of the property had signed the agreement. The litigants in the first suit stipulated the collection of a sufficient number of signatures. In a later action to enforce the covenant, however, the Court allowed the defendants to assail

[59] *Hansberry* retains its vitality, as indicated by the Supreme Court's approving citation in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 1971, 402 U.S. 313, 329, 91 S.Ct. 1434, 28 L.Ed.2d 788.

the validity of the agreement despite the earlier judgment. According to the Court, "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly ensures the protection of the interests of absent parties who are bound by it." 311 U.S. at 42, 61 S.Ct. at 118. After adopting a case by case approach to examining the procedural protection,[60] the Court held that preclusion on the facts of *Hansberry* violated due process. Not only were the defendants not parties or common law privies to the first action, but also their legal interests were not represented by the property owners who led the first class. The property owners in the first suit attempted to uphold the covenant while the defendants tried to invalidate it. Consequently, the class represented legal interests in direct opposition to the position of the defendants.

An analysis of the facts before this Court demonstrates that due process will not be violated by binding the CAB carriers to the judgment in *Southwest I*. Even though they were not parties to that action and have never presented evidence on the validity of the 1968 Ordinance, their interests were sufficiently represented by the public authorities to guarantee due process. Most

[60] Several student commentaries have recently suggested that this case by case due process consideration should dominate the analysis of res judicata questions. *See* Comment, *Non-Parties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 Calif. L.Rev. 1098, 1132, 1968; Note, *Collateral Estoppel of Non-Parties*, 87 Harv.L.Rev. 1485, 1500; Note, *The Expanding Scope of the Res Judicata Bar*, 54 Texas L.Rev. 527, 528, 534 (1976). These commentators suggest a balancing of due process factors: participation by the precluded party in the prior proceeding through intervention, combined discovery, amicus submissions, presence of counsel at hearings, testifying as a witness, advising previous parties; the extent of congruence between the legal interests and positions of the party to the earlier suit and those of the precluded party; the quality of representation of the precluded party's interests; the burdens relitigation poses to the judicial system; the costs and harassment that relitigation poses to parties.

importantly, their legal interests precisely coincide with those of the cities and the regional airport board. All of them assert that the TAC cannot thwart the phase-out provision of the ordinance. The situation presented in *Hansberry*, therefore, is not presented here. The appellants assert the contrary by arguing that the interests of the cities in *Southwest I* differs from the pecuniary interests of the carriers. This argument misreads *Hansberry*, a case that looks to the congruence of the legal interests of the parties and non-parties not to their financial stake in the litigation. The pecuniary interest of the airlines is legally immaterial to the judgment of *Southwest I* as affirmed by this Court. The judgment addresses the validity under Texas law of the 1968 ordinance, and on that issue no conflict exists between the cities and the CAB carriers.

The quality of the plaintiff's litigation in *Southwest I* also satisfies due process. A review of the record in that case reveals that the plaintiffs lost their suit only because both the district and appellate courts found the Texas law to be clearly against them.[61] The CAB carriers have not demonstrated, nor can we find, any deficiency in the performance of the plaintiffs' counsel. Consequently, this factor adds no weight that could tip the scales towards finding a violation of due process.

Several other factors also cut against finding a violation. First, the district court found as a matter of fact

[61] A commentator has criticized the district court decision in this case in part because "the quality of the representation of the absent parties claims was left purely to chance. . . . This procedure hardly satisfies the principles inherent in the constitutional guarantee of due process." 54 Tex.L.Rev. at 543. This argument disregards the perspective from which the due process judgment is made. To the extent that quality of representation is a factor in the due process balance, its weight corresponds to the *actual* quality of litigation demonstrated in the first trial. We see nothing in the record of the *Southwest I* to indicate any inadequacy in the advocacy of the plaintiffs' counsel.

that lawyers for the CAB carriers closely followed all of the Southwest litigation and attended the various hearings in the cases. Second, three of the airlines submitted amicus briefs to this Court in *Southwest I*. Their views on the state law issues therefore received full consideration. Third, the due process balance must include the damage relitigation would visit upon the judicial system and Southwest. As discussed above,[62] relitigation would constitute a blatent disregard for the decision of this Court and for the judgment of the federal district court in *Southwest I*. It would damage the public's interest in the most efficient allocation of judicial resources in both the state and federal systems of justice. It would impose substantial relitigation costs upon Southwest. It would threaten the rights granted Southwest by the *Southwest I* judgment. And finally, it would subject Southwest to the possibility of conflicting judgments.

Denial of the opportunity to bring a suit raises a serious due process question. We conclude, however, that the factors against allowing the carriers to sue outweigh the carriers' interests in relitigation. Preclusion of their private enforcement of a public ordinance does not violate due process when their legal interests were more than adequately represented by the public authorities that promulgated the ordinance and had the primary responsibility to enforce it.

V. CONCLUSION

This is the eighth time in three years that a federal court has refused to support the eviction of Southwest Airlines from Love Field. Precisely worded holdings and deference to state authorities by the federal judiciary have only generated more suits, appeals, and petitions for rehearings. Once again, we repeat, Southwest Air-

[62] *See* text at notes 22-23.

lines Co. has a federally declared right to the continued use of and access to Love Field, so long as Love Field remains open. The narrowly drawn preliminary injunction of the district court correctly protects that right. It does so without violating principles of federalism, the federal law of res judicata, or the dictates of due process.

The judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
N. D. Texas, Dallas Division

No. CA 3-75-0340-C

SOUTHWEST AIRLINES CO., PLAINTIFF,
TEXAS AERONAUTICS COMMISSION, INTERVENOR

v.

TEXAS INTERNATIONAL AIRLINES, INC., *et al.*
June 5, 1975

OPINION

WILLIAM M. TAYLOR, Chief Judge.

Plaintiff Southwest Airlines Co. (Southwest) applies to this court to enjoin defendants from undertaking to relitigate in a suit pending in a state district court of Travis County, Texas, certain rights and public duties previously litigated and determined by this court. The defendants are Texas International Airlines, Inc. (Texas International or T.I.); Delta Air Lines, Inc. (Delta); American Airlines, Inc. (American); Braniff Airways, Inc. (Braniff); Ozark Air Lines, Inc. (Ozark); Frontier Airlines, Inc. (Frontier); Continental Air Lines, Inc. (Continental); Eastern Air Lines, Inc. (Eastern), which airline defendants are sometimes hereinafter collectively referred to as CAB carriers or "signatory airlines", and the City of Fort Worth, Texas (Fort Worth); City of Dallas, Texas (Dallas), and Dallas-Fort Worth Regional Airport Board (Airport Board). Texas Aeronautics Commission (TAC) has intervened as a plaintiff.

On March 21, 1975, this court, on sworn allegation that defendants intended to rush to trial and judgment in the

Austin suit, restrained and enjoined defendants from prosecuting that portion of the state court suit pending in Austin, Texas, which attempted to exclude Southwest Airlines from Love Field while Love Field remains open and from otherwise directly or indirectly interfering with the judgment of this court rendered on May 11, 1973. Plaintiff's application for preliminary injunction pending final trial was heard on April 3, 1975, with notice to and appearance by the defendants. By letter dated May 15, 1975, the court advised all counsel of record that pending final trial defendants would be enjoined "from relitigating in state court issues which had previously been litigated, determined and adjudicated by this court affecting the right of Southwest Airlines to use Love Field." Defendants Continental, Dallas, Braniff, Regional Airport Board, and T.I., individually, and Delta American, Frontier, Ozark and Eastern, collectively, have filed motions to dismiss, asserting various grounds therefor such as lack of federal question jurisdiction, lack of diversity, abstention, unsettled questions of state law, and attempt by Southwest to secure an interlocutory appeal from an adverse ruling in state court. The court is of the opinion that such motions and grounds stated therefor are wholly without merit and are denied for the reasons hereinafter stated.

A history of this litigation made at the April 3, 1975, preliminary injunction hearing, and as appears from judicial notice which this court can take of its own records, is appropriate.

In 1972, in Cause 3-5927-C, the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas-Fort Worth Regional Airport Board sought declaratory judgment declaring their right under federal and state law to exclude Southwest, a purely intrastate air carrier, from Love Field on and after the opening of the new Dallas-Fort Worth Regional Airport. Defendant Southwest an-

swered and counterclaimed against the Cities and the Regional Airport Board, seeking a declaration of its right under federal and state law to remain at Love Field and an injunction to protect that right. On May 11, 1973, in that case, hereinafter referred to as *Southwest I*, this court entered an order declaring that plaintiffs therein "could not exclude Southwest Airlines Co. from the use of Love Field, Dallas, Texas, and its airport facilities so long as Love Field remains open." An exhaustive opinion discussing all matters raised by the parties was filed on June 21, 1973, and at the end of that opinion this language was used: "As the Court is confident that Plaintiffs will abide by its ruling in this case and not attempt to interfere with or burden Southwest's right to use Love Field, an injunction to enforce its decree is deemed unnecessary." That opinion appears in 371 F.Supp. 1015, and reference is made thereto. That case was appealed to the Court of Appeals for the Fifth Circuit.

Braniff, which was competing with Southwest for intrastate commuter traffic between Houston, Texas, San Antonio, Texas, and Dallas, Texas, continued to operate flights out of Love Field even after the new Dallas-Fort Worth Regional Airport opened for business in January 1974. Texas International secured from state court an injunction authorizing its operation of intrastate flights out of Love Field so long as Braniff remained at Love Field.

While *Southwest I* was still on appeal and before the Fifth Circuit had rendered its judgment, the City of Dallas adopted Ordinance No. 14505 by which it sought to exclude all commercial airlines from Love Field, making it an offense for certificated airlines to land at Love Field and levying a fine of $200 per landing or takeoff. Southwest filed suit against Dallas in Cause 3-73-344-C, pending in this court, to enjoin the enforcement of that ordinance. Since the ordinance flew squarely in the face of

the order entered by this court in *Southwest I*, preliminary injunction was granted. That case is hereinafter referred to as *Southwest II*. Braniff intervened in that case, likewise seeking to enjoin the enforcement of Ordinance 14505 and the Court likewise enjoined the enforcement of the ordinance insofar as Braniff was concerned.

On May 31, 1974, the Court of Appeals for the Fifth Circuit affirmed the judgment of this court. On June 24, 1974, it denied petitions for rehearing and rehearing en banc. On December 17, 1974, the Supreme Court denied petition for writ of certiorari (43 USLW through 4339) and thereafter on January 28, 1975, (43 USLW 3416), overruled the motion for rehearing of that denial. The opinion of the Court of Appeals for the Fifth Circuit appears in 494 F.2d 773.

It is interesting to note and worthy of comment here that Delta, American and Continental apparently recognized mutuality of interest in the outcome and filed amicus curiae briefs in the Fifth Court supporting the position of the Cities of Dallas and Fort Worth and the Regional Airport Board. Some of the same attorneys representing those parties have appeared in this court in *Southwest II*, as well as in the state court case pending at Austin, Texas, and in the case at bar.

Further identification of the airlines that are defendants here and their relation to and interest in all of this litigation seems to be in order at this point.

In early 1970, in order to insure that sufficient revenues would be available to maintain and operate the Regional Airport and meet all debt service requirements on the Airport Revenue Bonds, Regional Airport Board executed Letters of Agreement with the eight CAB-certificated air carriers then serving the Dallas-Fort Worth area. The air carriers executing that Letter Agreement are defendants here: American, Braniff, Continental,

Delta, Eastern, Frontier, Ozark and T.I., hence, their designation herein also as "signatory airlines".

By these Letter Agreements the signatory airlines agreed to move all of their certificated services serving the Dallas-Fort Worth area to the Regional Airport to the extent required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance. Each of the CAB carriers contracted to pay rentals, fees, and charges for its use, operations and occupancy of the D-FW Airport in an amount which together with rentals, fees and charges paid by other airlines and others using the airport premises and facilities would be sufficient to produce total gross revenue required to satisfy the Airport Board's obligations to collect each year monies sufficient to maintain and operate the Airport plus 1.25 times the debt service requirements of the Regional Airport Revenue Bonds plus an amount equal to any other obligations required to be paid from the revenues of the Airport.

After some three and one-half years of hearings, litigation and appeals occasioned by competing CAB-certificated carriers, on June 18, 1971, Southwest commenced its purely intrastate operations between Love Field, Dallas, and Houston and San Antonio, having consistently refused to execute the Letter Agreement. By virtue of these Letter Agreements it would appear that defendant CAB carriers are in privity with defendants Dallas, Fort Worth and Airport Board.

The history of the D-FW/Love Field controversy was further complicated in 1974 when the two Cities brought an action in the Fort Worth Division of the United States District Court for the Northern District of Texas against T.I., Braniff and American Airlines. Initially the two Cities sought relief against American for its refusal to pay certain landing fees at D-FW. They also claimed relief against Braniff and T.I. for operating at Love Field in violation of the 1970 Letter Agreements. In

March 1974, Delta intervened as plaintiff in that case and also sued Braniff and T.I. for damages due to increased landing fees at D-FW allegedly resulting from illegal use of Love Field by those two airlines. Procedural difficulties immediately developed when T.I. moved to dismiss the original complaint on grounds that neither federal question nor diversity jurisdiction existed. The alleged jurisdictional deficiencies triggered four of the parties to that case to voluntarily file a dismissal motion on March 22, 1974. Dismissal order was entered on March 26, 1974, and on the same day Delta and American brought another suit, this time suing Braniff, Dallas and Fort Worth for alleged breach of the 1970 Letter Agreements. Texas International was excluded as a defendant to that complaint. However, Fort Worth, by way of third-party complaint, brought in T.I. as a third-party defendant, claiming ancillary jurisdiction in the federal court.

Shortly after these procedural maneuverings, this court, believing that it was in the best interest of all concerned —the airlines, the Cities and the public generally, not to mention the interest of justice and conservation of judicial time—consolidated the Fort Worth litigation into Southwest's suit against the City of Dallas. This court was of the opinion that a more proper and just resolution of the controversy could be effected. Toward that end this court advised CAB, Federal Aviation Commission (FAA), TAC, and the CAB carriers of the pending consolidated litigation and requested their participation. None of the CAB carriers except those already named in the lawsuits actively participated or intervened but did observe the proceedings through courtroom appearances of their representatives. Texas International again moved to dismiss the case, alleging that diversity citizenship between the parties had been improperly and collusively invoked in violation of 28 U.S.C. 1359. This motion to dismiss was denied but the court certified it to the Fifth Circuit as a controlling question of law under 28 U.S.C. 1292(b).

Southwest moved for summary judgment in its portion of *Southwest II* and the court thereupon severed the ordinance dispute from the case originally filed in the Fort Worth Division of this court and on February 11, 1975, permanently enjoined the City of Dallas from enforcing Ordinance 14505 against Southwest. Within two weeks of that order all the remaining parties voluntarily dismissed their respective causes of action, undertaking thereby to terminate all of the *Southwest II* airport controversy insofar as the federal courts were concerned. The same controversy still raged, however. The parties simply changed the forum from the federal courts where they had enjoyed little success to a state court where they apparently hoped for a different result and are now pursuing their respective claims in Cause No. 227,349, styled *Texas International Airlines, Inc.*, v. *Dallas-Fort Worth Regional Airport Board, et al*, in the 200th District Court, Austin, Texas.

This court is fully aware of the Anti-Injunction Statute, to wit, Title 28, Section 2283, United States Code, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of it jurisdiction, *or to protect or effectuate its judgments.*" (Emphasis added)

This court is of the opinion that the question presented here comes squarely within the emphasized part of that statute.

A reading of the pleadings thus far filed in the Austin suit clearly demonstrates that a proper alignment made according to every one's true interest would have all the parties except TAC suing Southwest. Texas International and some of the other parties (except the Cities and Regional Airport Board which have so far kept a low profile in this case) contended that the relief desired in the Austin case encompasses something altogether apart from

Southwest's eviction from Love Field. However, paragraph 15 of T.I.'s petition purposes that the Austin court interpret the legal meaning of the Concurrent Bond Ordinance provision 2.1(g) defining "certificated air carrier service" and 9.5(A) stating the Love Field "phase-out" covenants insofar as they relate to Southwest's use of Love Field, all of which this court has previously passed upon. The petition also asserts that TAC's authority to certificate Southwest's flights into Love and to issue Minute Order No. 22 is properly a subject for re-investigation by the Austin court which was, of course, before this court and before the Fifth Circuit. The Fifth Court, speaking through Judge Gee in this case, said:

> "The power to designate 'routes' has, from times antedating any relevant to this case, been confided to that Commission. It deems self-evident that points of origin and destination are part of every 'route,' particularly short-haul ones. Indeed, to hold that a city could deny the use of public facilities to an airline certificated to it by the Texas Aeronautics Commission would cripple, if not destroy, the Commission's powers to control intrastate routes. Any city having only municipal airports would have an absolute veto power over routes to and through it—routes which involve the convenience and necessity of the state public, not merely that of the city. And a partial veto would exist even where other facilities existed. Southwest has been certificated by the Commission into Love Field and directed to continue service there until told otherwise. At a minimum, this constitutes Texas' exercise of its power to determine that Southwest's is not an improper use of Love Field. Dallas being Texas' creature, it may not declare otherwise. The cities' road to relief passes by the Texas Aeronautics Commission. They cannot reroute it by enacting ordinances in varying forms of words on a subject which is beyond their powers. 494 F.2d at 777.

In making this ruling the court relied upon the holding of the Supreme Court of Texas in *Texas Aeronautics Commission* v. *Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex. Sup. 1970).

By its brief filed in this case T.I. asserts that the principal issues raised in the Austin case include (1) the validity and meaning of the term "certificated air carrier service" as used in the 1968 Regional Airport Concurrent Bond Ordinance, (2) the right of T.I. to enforce the 1968 Bond Ordinance against those entities which violated its terms, (3) whether TAC's Minute Order No. 22 was intended to or may be construed to regulate the operation of Love Field, (4) the statutory power and authority of TAC to enact Minute Order No. 22, and (5) the validity of the financing agreement between T.I. and the Airport Board in the event that 1968 Bond Ordinance is found to be invalid or ineffectual to remove all scheduled air carrier service from Love Field which operate *in violation of its terms.* A casual reading of this court's opinion and order as well as the opinion of the Fifth Court would demonstrate that T.I. simply seeks to relitigate many of the propositions of law already determined by this court.

Additionally, one of the attorneys for Continental argued to Judge Matthews of the Austin court: ". . . Mr. Kelleher in his brief and to some extent in his argument talks about that this is an effort to undermind [sic] the federal court decision. That is not really an accurate characterization. Your Honor. *This is a frontal attack on it. The word undermind* [*sic*] *implies something covert about it. We come in with flags flying.*" (Emphasis added). See Defendant T.I.'s Exhibit No. 15 introduced at the April 3, 1975, hearing in this court. That part of the argument was made in the hearing on Defendant Southwest's pleas in abatement filed in the Austin court and which pleas were overruled by Judge Matthews by order dated February 21, 1975.

The concepts of cooperative federalism and comity although providing reason for federal courts to hesitate interfering with state court proceedings nevertheless do not prevent the undesirable friction created by the two court systems when a state court is allowed to reinterpret and perhaps upset a binding federal court judgment. *Jacksonville Blow Pipe Co.* v. *Reconstruction Finance Corporation*, 244 F.2d 394 (5th Cir. 1957); *American Radio Association* v. *Mobile Steamship Association*, 483 F.2d 1 (5th Cir. 1973). It seems appropriate here to point out also that the "exquisite friction" produced by collisions and near collisions between state and federal authority are most frequently produced when disgruntled litigants hop from one court to the other in hope of securing a contrary result. The Cities, the Airport Board and all of the airlines, whether actually parties in *Southwest II* or interested observers cheering on the efforts of the Cities and the Airport Board in *Southwest I*, are now on the playing field seeking a relitigation in state court of issues already determined by this court.

Ever since this court decided in *Southwest I*, some or all of the defendants have insisted that this court should abstain on the grounds that only state affairs were involved. It is to be recalled that the Cities and the Airport Board resorted to this court because a federal question was involved and this court proceeded to hear and decide that question as well as other questions related to it. It was even suggested that this court abstain in *Southwest II* where Dallas had adopted an ordinance in direct contravention of this court's judgment in *Southwest I*. I share the concern of all of the federal courts for the values of federalism and comity which in normal circumstances preclude federal court intervention with state proceedings and the abstention doctrine as expounded in *Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed 971

(1941); *Huffman* v. *Pursue, Ltd.*, (Supreme Court) 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), as well as *Dresser Industries* v. *Insurance Company of North America*, 358 F.Supp. 327, aff'd 475 F.2d 1402. In citing *Dresser* to this court, defendants wholly overlook the facts of that case. In that case there was no judgment nor order of the federal court involved. The parties there were not seeking to relitigate an issue already determined in the federal court. The plaintiff's petition in *Dresser* sought from this court a declaratory judgment in effect telling the state court how to there try the pending case. In my opinion the general prohibition of *Huffman* v. *Pursue* and *Younger* v. *Harris* are not apposite in this case since an injunction against the trial in state court would fall within the "protective jurisdiction" exception of the Anti-Injunction Act. For the same reasons the abstention doctrine can have no application here.

Plaintiff Southwest relies on the doctrines of "virtual representation", "res judicata" and "collateral estoppel".

In support of its "virtual representation" doctrine, plaintiff cites *Berman* v. *Denver Tramway Corporation*, 197 F.2d 946 (10th Cir. 1952). In that case Berman, a resident of the City and County of Denver, brought suit in state court seeking to enforce city ordinances limiting the fares to be charged by the local company. Denver Tramway Corporation, defendant in that proceeding, filed an action in federal court for an injunction against the state court proceeding on the ground that it constituted an impermissible relitigation of matters determined twenty-four years previously in a federal suit between Denver Tramway and the City and County of Denver. In that prior litigation the federal court had found the ordinances in question to be invalid and had permanently enjoined the local government from enforc-

ing them. The federal district court enjoined Berman from prosecuting the state court action, finding it to be the relitigation of a matter finally settled in the prior federal suit. The Tenth Circuit, in response to Berman's claim that the district court had been without jurisdiction, said:

> "A federal court is clothed with power to secure and preserve to parties the fruits and advantages of its judgment or decree. In the appropriate exercise of that power, the court has jurisdiction through means of a supplemental proceeding to enjoin the relitigation in a state court of a matter litigated, determined, and adjudicated by its valid decree regularly entered, if the result of the relitigation would be to destroy the effect of the decree rendered in the United States Court. And jurisdiction of the court to entertain such a supplemental proceeding is not lost by the intervention of time or the discharge of the res from the custody of the court. A supplemental proceeding of that kind may be entertained where the relitigation in the state court would result in nullifying the judgment or decree of the United States Court, or would render doubtful the rights of the parties in respect to the effectiveness of such judgment or decree. (Citing cases.) And for the purpose of protecting the effectiveness of its judgment or decree, a United States Court may entertain an independent action rather than a supplemental proceeding in the original action to enjoin the relitigation in a state court of matters already fully adjudicated in the United States Court. (Citing authority.) Viewed in the light of these cases, it is clear that for the purposes of effectuating and protecting the final decree rendered in 1924, the court had jurisdiction to entertain the supplemental proceeding to enjoin Berman from relitigating in the state court issues and controversies previously litigated and adjudicated in such final decree."

Defendants argue that *Berman* is old, worn-out, and no longer viable authority for this court's consideration Defendants, however, overlook the fact that on April 21, 1975, the Fifth Court bridged this gap in *Aerojet-General Corporation* v. *Askew*, 511 F.2d 710, in which the court determined the rights of a state agency to contest the title to certain lands before the Florida Supreme Court after a United States District Court and the Circuit Appeals Court had already ruled on the subject. In upholding the United States District Court which enjoined mandamus proceedings pending in the Florida Supreme Court, the Fifth Court said:

> "Federal law clearly governs the question whether a prior federal court judgment based on federal question jurisdiction is res judicata in a case also brought, as this one was, under federal question jurisdiction . . . Under the federal law of res judicata, a person may be bound by a judgment *even though not a party* if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." (Emphasis added.)

The fact that the CAB carriers are neither private citizens of Texas nor affiliated governmental bodies is recognized; however, as above stated, the 1970 Letter Agreements show the identity and mutuality of interests between the Airport Board, the Cities, and the airlines. Defendants' argument that their private business interests cannot be analogized to the Denver citizens in the *Berman* case is without merit. The economic interests of the Airport Board, the Cities, and the signatory airlines were fully developed before this court in *Southwest I* and argued before the Fifth Court and rejected as not being sufficient to justify the "unjust discrimina-

tion" under the 1958 Federal Aviation Act that would result if Southwest were evicted from Love Field while that airport continued its other air service. It seems obvious that the interests, business or otherwise, of the CAB carriers were merged into those interests held by the Cities as enforcers of the public's right. "Whether a party's interests in a case are virtually representative of the interests of a non-party is one of fact for the trial court." *Aerojet-General* v. *Askew, supra.*

The condition of the CAB carriers is candidly and clearly expressed at page 17 of the "Brief in Opposition to Preliminary Injunction on Behalf of Delta Air Lines, Inc., American Airlines, Inc., Frontier Airlines, Inc., Ozark Air Lines, Inc., and Eastern Air Lines, Inc.": ". . . the CAB carriers . . . are therefore entitled to seek judicial enforcement of the (1968 Bond) Ordinance." It is difficult to understand how defendant airlines can bootstrap themselves to claim some right or power greater than Dallas and Fort Worth which enacted the 1968 Ordinance. The CAB carriers can have no contract right with Southwest; they have no property right in Love Field; they have no order from CAB or TAC. The mutuality of interests of the CAB carriers with the Cities and the Airport Board must be held to have been established by the execution of the 1970 Letter Agreements. The right of the CAB carriers can only be a derivative right, and they take the 1968 Ordinance as they find it.

The doctrine of "collateral estoppel" almost appears to be another name for the doctrine of "virtual representation". The doctrine of "collateral estoppel" has also been reviewed and applied by the Court of Appeals for the Fifth Circuit in several cases in recent years. As above stated, the 1970 Letter Agreements created a "privity relationship" between the Airport Board and the Cities on the one hand and the CAB airlines on the other. As related to the collateral estoppel doctrine,

"privity" often refers to a non-party's interests in some litigation being so closely aligned or identified with the actual litigant's interests that the latter in fact represent the same legal rights. The most recent case by the Fifth Court is *International Association of Machinists and Aerospace Workers, et al,* v. *Franklin W. Nix,* 512 F.2d 125 (1975), in which the United States District Court at Atlanta enjoined further prosecution of certain counts of a state court action and Judge Gewin, in affirming the judgment of the trial court, made an exhaustive analysis of the authorities, including the "relitigation exception" of the Anti-Injunction Statute as well as the principle of collateral estoppel. Other cases by the Fifth Court include *Cauefield* v. *Fidelity and Casualty Company,* 378 F.2d 876 (5th Cir. 1967), cert. denied 389 U.S. 1009, 88 S.Ct. 571, 19 L.Ed.2d 606 (1967), in which the doctrine was held applicable to a non-party;[1] *Seguros Tepeyac, S.A., Compania Mexicana* v. *Jernigan,* 410 F.2d 718; *Wilson* v. *Retail Credit Co.,* 474 F.2d 1261 (5th Cir. 1973); *Donelon* v. *New Orleans Terminal Co.,* 474 F.2d 1108 (5th Cir. 1973);[2] *Cheramie* v. *Tucker,* 493 F.2d 586 (5th Cir. 1974) (see footnote 10 as to non-parties).

This court is of the opinion that under the doctrine of "virtual representation", "res judicata", "collateral estoppel", by whatever label we call it ("that which we call a rose—by any other name would smell as sweet"),

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[1] This case is a graphic illustration of the important interests which estoppel of non-parties may serve. It seems obvious that in a transaction involving 41 potential plaintiffs who might litigate identical claims against the same alleged tort feasor, the defendant's interests in avoiding vexatious, lengthy and costly relitigation of the issues as well as the judicial system's interest in economy and avoiding inconsistent results are extremely powerful.

[2] In which Judge Goldberg held that a federal district court properly enjoined Louisiana Parish officials from proceeding with a state court suit where the injunction was needed in aid of the federal court's jurisdiction.

and the facts of this case, plaintiff Southwest is entitled to an injunction enjoining and restraining defendants from relitigating in state court or in any other court action the validity, effect or enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the Cities of Dallas and Fort Worth insofar as it may affect the right of plaintiff Southwest Airlines to the continued use of and access to Love Field so long as Love Field remains open. As was so aptly said in *Wilson* v. *Retail Credit Co., supra,*

> "Every citizen is entitled to his day in court; however, our judicial system was not designed as an experimental laboratory to license losing parties to bring vexatious and repetitive claims based on the same transaction."

Order granting preliminary injunction will be filed herewith.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-2478

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD,
Plaintiffs-Appellants,

v.

SOUTHWEST AIRLINES CO.,
Defendant-Appellee,

and

TEXAS AERONAUTICS COMMISSION,
Intervenor-Appellee.

May 31, 1974

Rehearing and Rehearing En Banc
Denied June 24, 1974

Before ALDRICH, Senior Circuit Judge,* and BELL and GEE, Circuit Judges.

GEE, Circuit Judge:

This is a suit for declaratory judgment brought by the cities of Dallas and Fort Worth and their joint agent, an airport board created by intercity compact, to determine their right to close Dallas' Love Field to scheduled passenger service by a state-certificated, in-

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* Hon. Bailey Aldrich, Senior Circuit Judge of the First Circuit, sitting by designation.

trastate commuter line, Southwest Airlines Co. From a judgment that, so long as Love Field remains open as an airport, appellants may not exclude Southwest from it, plaintiffs appeal. We affirm.

Dallas and Fort Worth, large cities in north-central Texas about thirty miles apart, have been rivals over the years. Perhaps partly as a result of this, each developed its own airport. These lie more or less between the two cities and are themselves only twelve miles apart. In consequence of federal Civil Aeronautics Board hearings commenced in 1962, the cities were given to understand that, if they were unable to agree within a reasonable time on a single port for interstate air service to the Dallas-Fort Worth area, the CAB felt obliged to designate one.

The handwriting being thus upon the wall, the cities found themselves, after all, able to agree. In due course, and with CAB blessing and encouragement, they constructed a new airfield and persuaded all interstate, CAB-certificated carriers then serving the area to agree to move their services there.[1] Southwest, an intrastate commuter line certificated by the Texas Aeronautics Commission to serve Love, did not agree and has refused to move. By various ordinances, the validity and effect of which is our concern here, Dallas has sought to compel Southwest to vacate Love Field.[2]

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[1] Despite its contract, Braniff has refused to close operations from Love, and Texas International has now reopened there under the umbrella of a state-court injunction.

[2] The major ordinance which was before the court below and on which it based its decision was the 1968 Regional Airport Concurrent Bond Ordinance. This provides, in pertinent part, that the cities are to phase out Certificated Air Carrier Services to their existing airfields such as Love to the extent "legally permissible" and not in violation of "presently outstanding legal commitments or covenants prohibiting such action." The ordiance defines the operations to be phased out as follows:

[Footnote continued on page 3c]

[2] [Continued]

"'CERTIFICATED AIR CARRIER SERVICES' mean aircraft operations of the following types when operating on a regular and continuing basis, to wit:

"(1) interstate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Civil Aeronautics Board of the United States of America or any successor agency thereto:

"(2) services conducted by foreign air carriers according to published flight schedules holding permits or similar evidences of authority issued by the Civil Aeronautics Board or any successor agency thereto or by any other agency or department of the United States of America; and

"(3) intrastate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Texas Aeronautics Commission of the State of Texas or by any successor agency.

"It is provided, however, that this term shall not include services provided by commercial 'air taxi' operators meeting the requirements for examination provided from time to time by any rules and regulations of the Civil Aeronautics Board, by the Texas Aeronautics Commission or by any other agency of the United States of America or the State of Texas having jurisdiction to provide such exemptions."

Southwest urges, and the court below found, that the ordinance is artfully worded to eliminate its intrastate scheduled service only, since Texas does not regulate intrastate service of CAB-certificated interstate carriers and the ordinance does not require that these be moved. This seems correct, since none of the intrastate runs of Southwest's interstate competitors is certificated by the TAC and hence (3) of the above ordinance, while applying to Southwest, has no effect on them. At oral argument, this Court commented somewhat on this curious and unpleasant feature of the ordinance. Thereafter, both cities enacted and furnished to us ordinances closing their individual municipal airports to a broader range of uses. Dallas' provides, in pertinent part:

> "From and after May 1, 1974, Dallas Love Field and Redbird Airport will be closed to all regularly scheduled flights of aircraft that transport passengers or property for hire, except regularly scheduled flights of aircraft that transport passengers or property for hire between only Dallas Love Field or Redbird Airport and Dallas/Fort Worth Regional Airport."

Even so, we note that charter passenger flights by any size or type of plane remain untouched.

Were Love Field a private airfield, constructed without public funds, it may be assumed that its owner could exclude anyone he liked. Love, however, received substantial federal assistance and therefore must ". . . be available for public use on fair and reasonable terms and without unjust discrimination, . . ." 49 U.S.C. § 1718(1), formerly 49 U.S.C. § 1110. In addition, the Supreme Court of Texas long ago held that a Texas Home Rule municipality might not, by denying to common carriers use of its streets built in part at state and federal expense, interfere with their use of state highways passing through the city. Such actions were seen, in their extramunicipal effect, as going beyond the power of local government. City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927); City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927). The analogy seems close and valid.

Appellant cities urge that reasonable classification of *uses*—as distinguished from selection of *users*—does not constitute unjust discrimination.[3] We assume, without deciding, that this is so.[4]

If so, the question becomes, as to Texas intrastate flights, who is to make these just discriminations by use classifications? [5] It has a simple answer. In a recent de-

[3] See Aircraft Owners & Pilots Ass'n v. Port Authority of N. Y., 305 F.Supp. 93 (E.D.N.Y. 1969).

[4] If it is not so, then clearly neither Dallas nor any other authority can require Southwest to move from Love so long as it remains open to *any* use by aircraft.

[5] As to interstate flights, of course it would be the CAB, which appellants admit is authorized to, and does, designate points of origin and destination. The CAB has not, however, undertaken to assert jurisdiction, if any it has, over purely intrastate carriers such as Southwest, and indeed appears presently to acquiesce in state licensing of intrastate portions of interstate routes. *See* People v. Western Airlines, Inc., 42 Cal.2d 621, 268 P.2d 723, appeal dismissed, 348 U.S. 859, 75 S.Ct. 87, 99 L.Ed. 677 (1954).

cision, the Texas Supreme Court had occasion to consider the powers of the Texas Aeronautics Commission. It first correctly noted:

> In all matters of flying safety, such as the air worthiness of the aircraft and the skill of its operators, Air Southwest would be regulated by the Federal Aviation Agency. All Air Southwest aircraft and pilots would have federal certificates. However, by flying only in intrastate commerce and by not interlining with any CAB certificated carrier, making no connection for passengers or baggage, Air Southwest will not require a certificate from the federal agency in charge of economic regulations, the Civil Aeronautics Board. Congress has not pre-empted the field of the economic regulation of air carriers, and the states have the power to act so long as there is no conflict with federal law. 49 U.S.C.A. § 1301(3) and (10), and § 1371; Western Air Lines Inc. v. California, 42 Cal.2d 621, 268 P.2d 723 (1954), cert. denied, 348 U.S. 859, 75 S.Ct. 87, 99 L.Ed. 677; *see* Island Airlines, Inc. v. C.A.B., 331 F.2d 207 (9th Cir. 1964); Comment, 47 Texas L.Rev. 275 (1969).

Our Brethren of the District of Columbia Circuit emphatically agree and have so held in a case involving this general controversy. Texas Int'l Airlines, Inc. v. C.A.B., 154 U.S.App.D.C. 113, 473 F.2d 1150 (1972). And having determined that regulatory power over Texas intrastate air carriers still reposed with the State of Texas, the Texas Court further noted:

> The decision as to where the public interest lies and what air service is best for Texas must be made by the Texas Aeronautic Commission.
>
> Texas Aeronautics Com'n v. Braniff Airways, Inc., 454 S.W.2d 199 (Tex. Supp.1970).

The power to designate "routes" has, from times antedating any relevant to this case, been confided to that Commission.[6] It seems self-evident that point of origin and destination are part of every "route," particularly short-haul ones.[7] Indeed, to hold that a city could deny the use of public facilities to an airline certificated to it by the Texas Aeronautics Commission would cripple, if not destroy, the Commission's powers to control intrastate routes.[8] Any city having only municipal airports would have an absolue veto power over routes to and through it—routes which involve the convenience and necessity of the state public, not merely that of the city. And a partial veto would exist even where other facilities existed. Southwest has been certificated by the Commission into Love Field and directed to continue service there until told otherwise. At a minimum, this constitutes Texas' exercise of its power to determine that Southwest's is not an improper use of Love Field. Dallas being Texas' creature, it may not declare otherwise.[9] The cities'

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[6] Art. 46c-6, sub. 3, Vernon's Ann. Texas St., as amended.

[7] The Attorney General of Texas has ruled that the Commission's powers extend to routes entirely *within* one city. Op.Att'yGen'l of Texas, September 2, 1969. Here, little but designating points of take-off and landing is involved.

[8] Cf. City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927); City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927). Town of Ascarate v. Villalobos, 148 Tex. 254, 223 S.W.2d 945 (1949), is not to the contrary in upholding, as it does, reasonable regulation by the municipality of pickup and discharge points within the town for passengers of state-certified buslines.

[9] Dallas is a Home Rule City. The Texas Constitution, Art. 11, § 5, provides that no ordinance of such a city may be inconsistent with the State's general laws. Such a law is the Texas Municipal Airports Act, which grants to municipalities power to establish and control the use of airports, but provides in the same breath:

> "No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, *or to any regulations promulgated or standards established pursuant thereto.*" (footnote omitted; emphasis added) Art. 46d-7, V.A.T.S.

road to relief passes by the Texas Aeronautics Commission. They cannot reroute it by enacting ordinances in varying forms of words on a subject which is beyond their powers.[10]

Other grounds are urged in support of the judgment of the court below, including the asserted discriminatory effect on Southwest of the 1968 Regional Airport Concurrent Bond Ordinance noted at footnote 2 above and the effect of covenants in outstanding airport revenue bonds that Love will be kept open for scheduled airlines and general use so long as the bonds are unpaid. In view of our disposition of the case, we think it unnecessary to discuss these.

Affirmed.

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[10] The question whether an ordinance entirely closing Love Field to air traffic would be within Dallas' powers is not presented here, and we, of course, imply no view upon it.

APPENDIX D

UNITED STATES DISTRICT COURT
N.D. TEXAS
DALLAS DIVISION

No. CA 3-5927-C.

THE CITY OF DALLAS, TEXAS ET AL.,
Plaintiffs,

v.

SOUTHWEST AIRLINES COMPANY,
Defendant,

TEXAS AERONAUTICS COMMISSION,
Intervenor Defendant.

June 21, 1973.

MEMORANDUM OPINION

WILLIAM M. TAYLOR, Jr., Chief Judge.

This case involves the right of access of Southwest Airlines Co. (hereinafter sometimes referred to as "Southwest") to Love Field, a public airport owned and operated by the City of Dallas, Texas. Plaintiffs, the City of Dallas, the City of Fort Worth, and the Dallas-Fort Worth Regional Airport Board, seek a declaratory judgment, pursuant to 28 U.S.C. Sec. 2201, declaring their right under federal and state law to exclude Southwest, a purely intrastate air carrier, from Love Field on and after the opening of the new Dallas-Fort Worth Regional Airport. The Regional Airport, which is scheduled to open in the fall of 1973, is a joint undertaking by the Cities of Dallas and Fort Worth, each of which presently owns and operates its own airports. Plaintiff, the Re-

gional Airport Board, is an administrative body, created by contract and agreement between the cities, to which the cities have delegated certain operating powers over the Regional Airport. In conjunction with their joint effort on the Regional Airport, the Cities of Dallas and Fort Worth have convenanted to phase-out all Certificated Air Carrier Services (as defined in their 1968 Concurrent Bond Ordinance) at their respective wholly owned airports, including Love Field, to the extent that they may legally do so, and to transfer such services to the new Regional Airport upon its completion.

Defendant, Southwest, has answered and counterclaimed against the Cities and the Regional Airport Board seeking, pursuant to 28 U.S.C. Sec. 2201 and Sec. 2202, a declaration of its right under federal and state law to remain at Love Field and an injunction to protect that right. The Texas Aeronautics Commission (hereinafter sometimes referred to as the "TAC"), the state agency charged with the economic regulation of intrastate air carriers, has intervened as a Defendant in this case, adopting the contentions of Southwest Airlines and specifically urging that the attempted ouster of Southwest from Love Field usurps the TAC's exclusive regulatory power over intrastate air carriers; is invalid under state law; and is contrary to, and beyond the scope of, the powers delegated to Texas Home Rule cities by the State of Texas.

Jurisdiction in this case is founded on the existence of a Federal question and the amount in controversy, 28 U.S.C., Sec. 1331; on an act of Congress regulating commerce, 28 U.S.C. Sec. 1337; on 28 U.S.C. Sec. 1343(3) and (4); and on the pendent jurisdiction of the Court. The Federal causes of action arise under the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 et seq.; the Civil Aeronautics Act of 1938, 49 U.S.C., Sec. 401 et seq.; the Airport and Airways Development Act of 1970, 49

U.S.C., Sec. 1701, et seq.; 42 U.S.C., Sec. 1983 and Sec. 1958(3); and the Fifth and Fourteenth Amendments to the United States Constitution. The state causes of action are based on the Texas Aeronautics Act, Art. 46c-1 et seq., Vernon's Ann.Civ.St.; on the Municipal Airports Act, Art. 46d-1 et seq., V.A.C.S.; and on the Texas Constitution. The state causes of action are based on a common nucleus of operative fact with the Federal causes of action.

For many years the Cities of Dallas and Fort Worth were engaged in a fierce, intense and sometimes bitter rivalry for the business of commercial aviation and commercial air carriers. Dallas enlarged and improved its Love Field, which is approximately five to six miles north-northwest of the downtown business district of the City and Forth Worth, rather than undertaking the enlarging and improving of its inadequate Meacham Field, which is approximately five to six miles north of downtown Fort Worth, constructed a fine large airport, now known as Greater Southwest International Airport (GSIA), midway between the two cities. The downtown business districts of Dallas and Fort Worth are about 31 miles apart, and the two cities with the passage of time have grown, extended their limits, and in some places are almost contiguous. Only 12 miles separate Love Field and GSIA. Serving two airports which were so close together resulted in unnecessary expense to the carriers as well as the taxpayers and inadequate and incomplete air service to both cities. Happily, the two cities have now joined hands and are well on the way to the construction of what promises to be the finest airport in the world. The two cities joined together in the bringing of the lawsuit. This congenial alliance was not exactly the result of a shotgun wedding but more than a gentle nudge was provided by the Federal Government's Civil Aeronautics Board, hereinafter sometimes referred to

as CAB, which in August of 1962 instituted an investigation known as the Dallas-Fort Worth, Texas Regional Airport Investigation, Docket No. 13959, for the purpose of determining whether or not the certificates of public convenience and necessity of interstate airlines under the CAB's jurisdiction should be amended so as to designate a specific airport as the single point through which all interstate air carrier service to Dallas and Fort Worth must be provided. Finally, after many hearings, the CAB in 1964 entered an interim order giving the two cities a period of 180 days in which to arrive at a voluntary agreement to designate the single airport through which the CAB-regulated carriers would serve the Dallas-Fort Worth area. It indicated that if the parties were unable to agree on the designation of the airport to serve the area, it would then proceed to issue a final determination and amend the certificates of the interstate "air carriers" under its jurisdiction so as to cause them to serve either Love Field or Fort Worth's GSIA. The CAB has entered no further orders in the investigation and none of the certificates of the carriers under CAB jurisdiction have been amended.

Rather than designating an existing municipal airport to serve the Dallas-Fort Worth area, the cities agreed to construct and operate a new regional airport to be located approximately midway between Dallas and Fort Worth at Grapevine, Texas. Thereafter, on November 11 and 12, 1968, the cities jointly adopted the 1968 Regional Airport Concurrent Bond Ordinance authorizing the issuance of Dallas-Fort Worth Regional Airport Joint Revenue Bonds for the financing of the new airport. The 1968 Ordinance provides, among other things, that the cities:

> ". . . shall take such steps as may be necessary, appropriate and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certified Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport." Section 9.5.

The Ordinance also provides, in Section 9.5, for a waiver of the phase-out provision if eight (8) members of the eleven (11) member Regional Airport Board determine that a waiver is necessary "(1) in the interest of the public safety; (2) in the interest of prudent and efficient operations at the Regional Airport; or (3) in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole." In addition, the Ordinance specifies that if the grant of a waiver by the Regional Airport Board results in a reduction in Regional Airport revenues, the city benefiting from the waiver must pledge to transfer back to the Regional Airport such amount as will justly compensate such Airport for its loss of revenue.

In early 1970, in order to insure that sufficient revenues would be available to maintain and operate the Regional Airport and to meet all debt service requirements on the Airport Revenue Bonds, the Regional Airport Board executed Letters of Agreement with the (8) eight CAB certificated air carriers then serving the Dallas-Fort Worth area.[1] These letter agreements provide that each signatory airline will ". . . move all of its Certificated Air Carrier Services serving the Dallas-Fort Worth area to the Airport . . . to the extent required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance."

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[1] These air carriers are American Airlines, Inc.; Braniff Airways, Incorporated; Continental Airlines, Inc.; Delta Air Lines, Inc.; Eastern Air Lines Incorporated; Frontier Airlines, Inc.; Ozark Air Lines, Inc.; and Texas International Airlines, Inc.

Each of the CAB carriers also contracts "to pay rentals, fees and charges for its use, operations and occupancy of the Airport premises and facilities and the services appertaining thereto in an amount which, together with the rentals, fees and charges paid by other Airlines and others using the Airport premises and facilities, will be sufficient to produce total gross revenues required to satisfy the Airport Board's obligation . . ." to collect each year monies sufficient to maintain and operate the Airport, plus 1.25 times the debt service requirements on the Regional Airport revenue bonds, and plus an amount equal to any other obligations required to be paid from the revenues of the Airport.

On June 18, 1971, after some three and one-half years of hearings, litigation and appeals occasioned by competitive CAB certificated air carriers, Defendant Southwest Airlines Co. commenced its purely intrastate operations, as a "commuter airline," between Love Field, Dallas, and Houston and San Antonio, pursuant to Certificate of Public Convenience and Necessity No. 22 issued by the Texas Aeronautics Commission (TAC). Southwest's Certificate stated that it was authorized to serve the Dallas-Fort Worth region through "any" airport in the area. On November 12, 1971, however, the TAC issued a general order and regulation, styled "Minute Order No. 22," which directed all TAC certificated airlines not to change the airports from which they were then conducting their intrastate services unless they first obtained written approval from the TAC to do so. On and before November 12, 1971, Southwest was operating from Love Field, as it continues to do today.

On October 20, 1971, Southwest Airlines formally advised the Regional Airport Board that it intended to stay at Love Field when the eight (8) CAB certificated airlines moved their operations from Love Field to the Regional Airport, Southwest also withdrew from its brief

participation in planning sessions regarding the transfer of services from Love Field to the Regional Airport, and declined to execute the letter agreement with the Airport Board that had previously been signed by the CAB carriers.

On March 6, 1972, Southwest Airlines filed with the Regional Airport Board an instrument called a "Petition for Exemption, or Alternatively, Application For Waiver," by which it sought a determination from the Airport Board that Southwest was not required by the 1968 Concurrent Bond Ordinance, and could not lawfully be required, to move to the Regional Airport, or alternatively, that a waiver of the transfer requirement should be granted under Section 9.5(A) of the Ordinance on the basis of an "overriding public need." After holding this Petition for three months without acting upon it, the Airport Board decided, on June 6, 1972, that the CAB rulings in the Dallas-Fort Worth Regional Airport Investigation deprived the Airport Board of jurisdiction to consider and act upon Southwest's Petition. That same day the two Cities and the Airport Board filed their Complaint against Southwest, commencing this lawsuit.

Among other contentions Plaintiffs argued in their Complaint that they were required by the ruling of the Civil Aeronautics Board in the Dallas-Fort Worth Regional Airport Investigation to transfer all certificated air carrier services to the new Regional Airport, including the intrastate services of Southwest Airlines. While Plaintiffs seem to have abandoned this position in their closing arguments and brief, the Court, nevertheless, finds their contention in this regard without merit because, among other reasons: (1) the Civil Aeronautics Board has no jurisdiction over a purely intrastate airline such as Southwest; (2) it never attempted to assert any such jurisdiction in its interlocutory orders entered in the Regional Airport Investigation; (3) it has jurisdiction

only over "air carriers" engaged in "interstate air transportation"; and (4) it has no jurisdiction over cities or their airports, as such.

Pursuant to the Federal Aviation Act of 1958, the Civil Aeronautics Board is authorized to exercise regulatory jurisdiction *only* over air carriers engaged in "interstate air transportation" as that term is defined in the Act.[2] Western Air Lines, Inc. v. California, 42 Cal.2d 621, 268 P.2d 723 (1954), appeal dismissed, 348 U.S. 859, 75 S.Ct. 87, 99 L.Ed. 677. Because Southwest does not engage in, and is not authorized to engage in, "interstate air transportation," the CAB itself has held that it has no jurisdiction over Southwest Airlines (then known as "Air Southwest Co."). See CAB Orders 71-6-79 and 71-9-23 (1971), in Texas International Airlines, Inc. v. Air Southwest Co., Docket 23047, and Braniff Airways, Inc. v. Southwest Co., Docket 23122. The CAB's position that it lacks jurisdiction over Southwest has been repeatedly upheld by the Court. Texas International Airlines, Inc. v. CAB, 154 U.S.App.D.C. 113, 473 F.2d 1150, 1152 (1972); Braniff Airways, Inc. v. CAB, *ibid;* Texas Aeronautics Commission v. Braniff Airways, Inc., 454 S.W.2d 199, 200 (Tex. Supp.1970), cert. denied, 400 U.S. 943, 91 S.Ct. 244, 27 L.Ed2d 247 (1970). Under the law, no orders or rulings by the Civil Aeronautics Board in the Dallas-Fort Worth, Texas, Regional Airport Investigation could be binding on, or in any way applicable to,

[2] The Federal Aviation Act defines "interstate air transportation" as "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

> "(a) a place in any State of the United States . . . and a place in any other State of the United States . . .; or between places in the same State of the United States through the airspace over any place outside thereof . . ." 49 U.S.C. Sec. 1301(21).

Southwest Airlines does not carry any mail. It does not fly between Texas and any other State. It does not fly through any airspace outside of the State of Texas.

Southwest Airlines. Furthermore, there is nothing in the language of the CAB orders which would indicate that any of them were directed to intrastate airlines such as Southwest.[3]

[3] As used in the CAB Orders, "air carrier" is a term of art and not of general description. It is defined in 49 U.S.C. Sec. 1301(3) to mean "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in *air transportation* . . ." (emphasis added).

"*Air transportation,*" in turn, is defined as "*interstate,* overseas, or foreign air transportation or the transportation of mail by aircraft." 49 U.S.C. Sec. 1301(10) (emphasis added). The Court finds no indication that the CAB in its Orders intended to apply the term "air carriers" to purely intrastate airlines, i. e., in a manner at variance with the definition of that term in the Federal Aviation Act.

Defendant Southwest has also contended, in answer to Plaintiffs' argument of federal compulsion arising from the CAB Orders in the Dallas-Fort Worth Regional Airport Investigation, that such Orders are non-coercive, speaking only in terms of a "voluntary agreement" between the Cities; that the CAB's power to designate a single airport for the Dallas-Fort Worth area derives not from any CAB power over the Cities of Dallas and Fort Worth, but solely from the CAB's power to amend the certificates of public convenience and necessity of the CAB carriers, which certificates remain unamended to this date; and, finally, that Plaintiffs themselves admit in their Complaint that "no order terminating the investigation has ever been entered and the entire proceeding remains open to this date, and under the continuing jurisdiction of the Civil Aeronautics Board." Southwest argues that, under these circumstances, the CAB has not yet actually ordered any airline, interstate or intrastate, to leave Love Field, and, consequently, that there is no substance to Plaintiffs' argument that they are seeking to exclude Southwest pursuant to CAB Orders. Southwest has also pointed out that it has never been accorded either notice or hearing with respect to the Regional Airport Investigation, and that, consequently, any application to Southwest of Orders emanating from that Investigation would be in direct violation of the Federal Aviation Act, 49 U.S.C. Sec. 1371(g), as construed in American Airlines, Inc. v. Civil Aeronautics Board, 123 U.S.App.D.C. 310, 359 F.2d 624 (1966), cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75; the Administrative Procedure Act, 5 U.S.C. Secs. 554 and 556; and the Fifth and Fourteenth Amendments to the United States

Plaintiffs' next argument rests on the premise that the CAB has ordered all CAB "air carriers" to move to the Regional Airport, and that, since Love Field and the Regional Airport have both received federal funds pursuant to federal airport aid programs, the Plaintiffs are required to exclude Southwest from Love Field in order to avoid unjustly discriminating against the CAB carriers in violation of 49 U.S.C. Secs. 1110 and 1718.[4] This argument misconceives the function, purpose, and application of the federal anti-discrimination statutes.

The federal prohibition against unjust discrimination is designed to insure that the *airport owner or operator* (referred to as the "sponsor" in both the statutes and the grant agreements) provides potential users of the

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Constitution, see Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 81 S.Ct. 1611, 6 L.Ed.2d 869 (1961). Although the Court is of the opinion that each of these contentions is valid, it does not deem it necessary to discuss them extensively in light of its conclusion that the CAB Orders were not directed to purely intrastate airlines and its further conclusion that the CAB lacks jurisdiction over Southwest.

[4] The Federal Airport Act, 49 U.S.C. Sec. 1110, provided in pertinent part:

> "The Administrator shall receive assurances in writing, satisfactory to him, that—
>
> "(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination."

This provision was subsequently transferred to, and now appears in, the Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1718, which provides:

> "As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—
>
> "(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;"

As discussed more fully hereafter, Dallas has received federal aid pursuant to both statutes.

airport with a fair and nondiscriminatory "opportunity" to use its facilities, provided the user can lawfully do so. If the potential user cannot, or does not, choose to avail itself of the "opportunity" to use the airport, the airport operator is obviously not required to exclude those who can and do choose to use such facilities. Therefore, even if the Plaintiffs were correct in arguing that the CAB has excluded the interstate carriers from Love Field, there would still be no merit to their contention that, consequently, they must eject Southwest Airlines. The forbidden discrimination can occur only as between parties that are legally able to serve Love Field and are desirious of so doing. To hold otherwise would lead to exceedingly incongruous results.

Suppose, for example, the reverse situation existed and a state regulatory agency had ordered an airline under its jurisdiction to cease operations at a particular airport. Under Plaintiffs' view of the law, the airport owner would then be required by federal law to exclude all CAB carriers who remained there. Similarly, suppose the CAB ordered some carriers under its jurisdiction to leave Love Field, but not others. Under Plaintiffs' argument, the airport operator would then have to exclude the remaining carriers in order not to discriminate against those that had been ordered to leave. Presumably, the same line of reasoning would apply to voluntary abandonments by airport users. Obviously, the Congress did not intend so bizarre an interpretation of its anti-discrimination statutes. The Court concludes that the removal of Southwest Airlines is not required by any prohibition against unjust discrimination.

The Plaintiffs have similarly contended that allowing Southwest to use Love Field, after the opening of the Regional Airport, would violate 49 U.S.C. Sec. 1349(a), which provides:

> "There shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended."

In interpreting this Statute, the Federal Aviation Administration has pointedly observed:

> "The presence on an airport of one person engaged in an aeronautical activity as herein defined will not itself be considered a violation of this policy if there is no intent by express agreement, imposition of unreasonable standards or requirements, or by any other means to exclude others. This would occur when the volume of business may not be sufficient to attract more than one person. *As long as the opportunity to engage in an aeronautical activity is available to those meeting reasonable qualifications and standards relevant to such activity, the fact that only one person takes advantage of the opportunity does not constitute the grant of an exclusive right.*" (emphasis added) 30 F.R. 13, 661.

The Plaintiffs have again attempted to use a statute to justify conduct which that statute expressly prohibits. If the CAB carriers are precluded from serving Love Field after the opening of the Regional Airport, such preclusion results from action by the CAB, which has no jurisdiction over Southwest, or from the voluntary Letter Agreements between the Plaintiffs and the CAB carriers. The CAB carriers have not been excluded from Love Field by the *Plaintiffs*, and, therefore, Southwest's presence at Love Field after the opening of the Regional Airport can in no way be considered the prohibited grant of an exclusive right. Southwest has not voluntarily relinquished its right to serve Love Field and that right has not been limited or restricted by any regulatory agency with authority over Southwest.

Plaintiffs next argue that the Regional Airport is part of the National Airport System Plan and is "totally

consistent with" the Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701 et seq. Plaintiffs appear to argue that since they have received $60,484,031.27 in federal funds from the Federal Aviation Administration for the Regional Airport, and the Secretary of Transportation has acted jointly with the Cities of Dallas and Fort Worth in planning the Regional Airport, the actions of the two Cities are somehow rendered immune from, or supreme to, the law.

The Court notes preliminarily that the Airport and Airway Development Act was passed by Congress in 1970, five years after the Plaintiffs had received FAA Commitments for the Regional Airport Project and two years after the enactment of the 1968 Ordinance which required the termination of Certificated Air Carrier Services at Love Field upon the opening of the Regional Airport. Whether or not Plaintiff's actions herein are "consistent" with this subsequent federal legislation is immaterial. The important consideration, and the one which is fatal to Plaintiffs' contention in any and all events, is that the Airport and Airway Development Act could not have authorized the phase-out provision of the 1968 Ordinance. That Act, while containing a prohibition against unjust discrimination by airport owners receiving federal funds, see 49 U.S.C. Sec. 1718, and while establishing a mechanism for the disbursement of such funds, does not confer upon either the Federal Aviation Administration or the Plaintiffs herein any economic regulatory power over air carriers. The purpose of the Act is to promote the planning and construction of airports, not to confer upon cities the power to decide the routes of air carriers, which involves determinations of public convenience and necessity.[5] It should also be men-

[5] Nothing herein is intended to imply that the FAA may not exclude particular aircraft from an airport pursuant to its power to regulate safety in civil aeronautics; see Sub-chapter VI of the Federal Aviation Act of 1958, 49 U.S.C. Secs. 1421-1430. However,

tioned that the only funds allotted to the Cities of Dallas and Fort Worth under this Act have been allocated to the Regional Airport and not to Love Field. Plaintiffs have not shown that the FAA has taken any action under the Act with respect to Love Field.

Finally, Plaintiffs apparently contend that if Southwest Airlines is permitted to remain at Love Field after the opening of the Regional Airport, the ability of the Regional Airport Board to operate that Airport and to retire the outstanding debt on the Airport Revenue Bonds will be jeopardized due to diversion of needed revenue to Love Field. It is not seriously argued by Plaintiffs that the revenues from Southwest Airlines' three present aircraft and the passengers they carry are, in and of themselves, essential to the operation of the Regional Airport. Instead, Plaintiffs maintain that Southwest's continued presence at Love Field will, to some extent, induce the CAB carriers to retain service there (an argument that Southwest has characterized as the "domino theory") and that the cumulative loss of revenue from Southwest *and* these other carriers will have a significant impact on the financial security of the Regional Airport.

In the opinion of the Court, the following evidence, among other items, demonstrates that Plaintiffs have

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as testified to by Mr. Henry Newman, the Regional Administrator of the FAA, there are no safety considerations which require the exclusion of Southwest Airlines from Love Field at this time and there are no foreseeable safety problems at Love Field after the opening of the Regional Airport. Therefore, the Court concludes that matters of safety are not involved in this case.

Mr. Newman also sponsored an Environmental Impact Statement which pertained to the Regional Airport, rather than to Love Field, and which was adopted five years after the FAA had committed funds to the Regional Airport. The relationship of this Statement to Southwest's right to remain at Love Field was never explained or pressed by Plaintiffs, and no environment issues relevant or material to this matter were ever raised by Plaintiffs.

over-stated their fears concerning the financial impact upon the Regional Airport of Southwest's remaining at Love Field:

1. The eight (8) CAB carriers executing the Letter Agreements have agreed to pay any deficit resulting from the operation of the the Regional Airport, including 1.25 times the annual debt service on the Regional Airport Revenue Bonds. Plaintiffs' Exhibits purporting to show diversion of funds from the Regional Airport to Love Field in fact show that the Regional Airport receives the same amount of revenues annually whether Southwest Airlines is there or at Love Field. Any diversion which occurs constitutes, at most, an added cost to the CAB carriers. It does not penalize the Regional Airport Board or the citizens of Dallas and Fort Worth.

2. The outstanding Love Field "Senior Lien Bonds" are a first lien upon Regional Airport revenues and must be paid even before the Regional Airport Revenue Bonds themselves. Thus, any revenue generated at Love Field by Southwest Airlines defrays the costs and expenses of the Regional Airport, if the income from Love Field is insufficient to pay *its* maintenance and operating expenses and debt service.

3. The Plaintiffs' "diversion" exhibits were basically predicated upon the assumption that *all* Dallas/Fort Worth intrastate air service would be provided through Love Field if Southwest Airlines remained there. It was forceably demonstrated by Defendants that this assumption was erroneous and that the "diversion" figures in question were therefore overestimated. Plaintiffs' own conduct and opinions confirm this. First Southwest Company, an investment banking firm under contract to the Regional Airport Board as its financial advisor, gave its written opinion on March 10, 1972, that Southwest Airlines' refusal to go to the new airport was not

a fact of any material financial significance to the $12 million in revenue bonds issued on March 29 of that year, and Thomas Sullivan, the Executive Director of the Regional Airport Board, concurred in that judgment in a written opinion of March 16, 1972, pointing out that the new airport had never included any projected revenues from Southwest Airlines in its own revenue projections. Similar statements of lack of "materiality" were made in the Official Statements pertaining to bonds issued significant to the institution of this lawsuit and were concurred in by Mr. Decker Jackson of First Southwest Company during his testimony.

Although not pleaded by Plaintiffs, this Court is not indifferent to the financial needs of the Regional Airport. However, the evidence which Plaintiffs have presented on this point is at best inconclusive, and its relevance to the fundamental legal issues in this case has never been explained. Financial necessity can neither legitimize an unjust discrimination nor augment the basic power of municipalities as granted to them by the State. Plaintiffs have wholly failed to establish that Southwest Airlines is required by law to remove its operations to the Regional Airport upon its opening. The Court now turns its attention to the question of whether the Plaintiffs may directly or indirectly exclude Southwest from Love Field when the Regional Airport opens.

It is the conclusion of this Court that none of the Plaintiffs have the power to deny Southwest access to Love Field for any aspect of its operations. It is likewise beyond the power of Plaintiffs, or any of them, to require Southwest to provide any services through the Regional Airport upon its opening. The bases for this conclusion are numerous, but their number should not detract from the fact that each ground is, in and of itself, sufficient to preclude Plaintiffs from denying Southwest access to Love Field.

Love Field is *public* facility and installation. There is no dispute among the parties to this case that Love Field has over the years been the recipient of federal funds, property and land through various federal aid programs, and that it is subject to federal prohibitions against unjust discrimination and the grant of an exclusive right.[6] In the early 1940's, Love Field was the recipient of federal funds through WPA grants. During World War II, the United States Government enlarged the field, improved the runways, and established various facilities there. Following the War, in 1949 and again in 1955, the United States conveyed equipment, buildings and land to Love Field pursuant to the Surplus Property Act, and in 1950 and 1951 (and by subsequent amendments), grants in aid of approximately $429,603.95 were made to Love Field pursuant to grant agreements between the City of Dallas and the Civil Aeronautics Administration acting under the Federal Airport Act. In addition, the Federal Aviation Administration has spent in excess of $29,000,000 for its general operations at Love Field and for navigational aids. Finally, as previously noted, the Regional Airport has received, since 1966, in excess of $60,000,000 in federal aid pursuant to the Federal Airport Act and the Airport and Airway Development Act of 1970. In accordance with present FAA policy, the receipt of such aid subjects *all* airports under the operation and ownership of the recipients thereof to the aforementioned statutory prohibitions. See 30 F.R. 13, 661 and grant agreements to the Regional Airport. Since both Dallas and Fort Worth are recipients of federal funds through the grants-in-aid to the Regional Airport, all of their municipal airports are subject to federal restrictions.

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[6] See 49 U.S.C. Secs. 1110(1) and 1718(1); 50 App. Sec. 1622(g); and 49 U.S.C. Sec. 1349(a).

In order to properly assess Southwest's argument that its exclusion from Love Field will violate federal law, it is necessary to examine Plaintiffs' present plans for the use of Love Field after the Regional Airport becomes operational.

As discussed above, the 1968 Concurrent Bond Ordinance provides for the phase-out of all "Certificated Air Carrier Services" from Love Field after the opening of the Regional Airport. The term "Certificated Air Carriers Services" is defined in Section 2.1G of the Ordinance as follows:

> "G. 'CERTIFICATED AIR CARRIER SERVICES' mean aircraft operations of the following types when operating on a regular and continuing basis, to wit:
>
> (1) interstate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Civil Aeronautics Board of the United States of America or any successor agency thereto;
>
> (2) services conducted by foreign air carriers according to published flight schedules holding permits or similar evidences of authority issued by the Civil Aeronautics Board or any successor agency thereto or by any other agency or department of the United States of America; and
>
> (3) intrastate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Texas Aeronautics Commission of the State of Texas or by any successor agency.
>
> It is provided, however, that this term shall not include services provided by commercial 'air taxi' operators meeting the requirements for exemption provided from time to time by any rules and regulations of the Civil Aeronautics Board, by the Texas Aeronautics Commission or by any other agency of the United States of America or the State of Texas having jurisdiction to provide such exemptions."

It should be noted that subsection (3) of the definition of "Certificated Air Carrier Services" clearly includes Defendant herein, Southwest Airlines Co. However, "air taxi" operators are expressly excluded from the definition, and therefore not subject to the phase-out requirement, despite the fact that such operators carry passengers for hire on a scheduled basis; are certificated by the TAC with respect to their intrastate services; and are competitors of Southwest Airlines. Moreover, the phase-out requirement is also inapplicable to all unscheduled charter flights, even when conducted by CAB certificated air carriers; to general aviation (i.e., private and corporate aircraft); and to unscheduled cargo flights, all of which fall outside the definition of "Certificated Air Carrier Services." The purely intrastate services of the eight CAB carriers presently operating at Love Field are likewise outside the scope of the Ordinance, inasmuch as the only intrastate services covered by the Ordinance are those certificated by the TAC and the intrastate services of the CAB carriers are not so covered. Thus, with respect to intrastate air services, the 1968 Concurrent Bond Ordinance is applicable *only* to Southwest, since, except for the specifically exempted air taxis, Southwest Airlines provides the only TAC certificated intrastate air service to Love Field.

Plaintiffs contend that after the opening of the new Regional Airport, Love Field will become a general aviation facility due to the exclusion of all scheduled commercial operations, and that the classification scheme that has been adopted to accomplish this end is a reasonable one. The Court must disagree.

In the first place, Plaintiffs have not excluded all scheduled commercial operations from Love Field, but have expressly exempted air taxi operators from the phase-out requirement of the Ordinance. Whether the air taxi operators actually choose to remain at Love Field is not important; the controlling consideration is that under the Ordinance they are eligible to do so.

Moreover, the purely intrastate operations of the CAB carriers are also not included in the definition of the air carrier services to be excluded from Love Field. The Ordinance by its express terms phases out air carrier "*services*" (emphasis added). The only *intra*state air carrier services to which the phase-out provision of the Ordinance applies are those services performed by carriers certificated by the TAC. With respect to carriers certificated by the CAB, however, the only air carrier "services" covered by the Ordinance are *inter*state air carrier services. The Ordinance, therefore, fails to exclude from Love Field any intrastate *services* conducted by the CAB carriers.

Since the phase-out provision of the 1968 Ordinance applies only to intrastate services provided by Southwest Airlines, and not to such intrastate services provided by others, it must be deemed to be unjustly discriminatory.

Once again, what is important in assessing Plaintiffs' contention of reasonableness is whether the purely intrastate services of carriers other than Southwest are actually excluded from Love Field by the Ordinance, not whether by choice, contract, or regulatory order, those carriers will, in fact, operate from the Regional Airport in whole or in part. These considerations inexorably lead the Court to the conclusion that the phase-out provision of the 1968 Concurrent Bond Ordinance would be unjustly discriminatory if applied to Southwest Airlines.

Secondly, even if the classification scheme involved in the 1968 Ordinance accomplished what Plaintiffs contend, this Court would still have to find it unreasonable in other respects.

The evidence shows that after the Regional Airport becomes operational, aircraft of every size and description will be permitted to continue using Love Field. There will be no restriction placed on the frequency of flights at Love, which is presently certificated for I.F.R. and V.F.R. operations and will not be downgraded after the opening of the Regional Airport. Braniff will continue to use its Love Field maintenance base for maintenance work on its fleet. All sizes of planes can use Love Field for ferry flights and refueling stops, and private aircraft of all sizes and kinds will be positively encouraged to use Love Field. Moreover, charter flights carrying passengers for hire on an unscheduled basis will continue to operate out of Love Field without restriction on the size of the aircraft they may use or on the frequency of their flights. As already noted, the scheduled commuter air services (intrastate and interstate) furnished by air taxi operators will be permitted to continue at Love after the move to Regional. In short, some of the operations to remain at Love Field will use planes larger than Southwest's; some will use planes noisier than Southwest's; some will use planes identical to Southwest's; and, indeed, some of the aircraft operations may be on a scheduled basis and compete in markets which Southwest presently serves. The question before the Court is whether, under these circumstances, Plaintiffs can exclude Southwest from Love Field in the face of the express statutory prohibitions against both unjust discrimination and the grant of an exclusive right to use the facilities of Love Field.

The "unjust discrimination" and "exclusive right" prohibitions were considered in Judge Dooling's decision in

Aircraft Owners and Pilots Association v. Port Authority of New York, 305 F.Supp. 93 (E.D.N.Y. 1969), a case involving the exaction of a $25.00 fee for General Aviation aircraft landing or taking off during the peak traffic periods at the three major airports in the New York metropolitan area. The suit was brought by owners of private aircraft to invalidate the landing fee on the grounds that it "unjustly discriminated" against general aviation in favor of commercial airlines. While the Court ruled that the landing fee was not unjustly discriminatory on the facts of the case before it the rationale for its decision makes it abundantly clear that, on the facts of this case, Plaintiffs have unjustly discriminated against Southwest and have impermissibly granted an exclusive right to use Love Field to those allowed to remain there after Southwest's exclusion.

It is clear from the *Port Authority* opinion that the decisive factor in the Court's ruling was the well-recognized preference which commerical air traffic enjoys over all other classes of aviation. As the Court said:

> "But in any contest that had to be resolved in terms of the public convenience and necessity, a resolution in favor of the mass transportation carriers as against general aviation was the dictate of simple reason." 305 F. Supp. at 108.

The Court's conclusion that a definite preference existed for mass transportation over private aircraft was buttressed by established FAA policy and by the Federal Aviation Act itself. Insofar as that Act was concerned, the Court noted that this preference was justified by 49 U.S.C. Sec. 1304, which states that:

> "There is recognized and declared to exist in behalf of any citizen of the United States a public right

> of freedom of transit through the navigable airspace of the United States."

Since commercial aviation represents the right of a greater number of people to use the navigable airspace of the United States, implementation of the Congressional policy requires a preference for commercial aircraft over private aircraft (and by implication over air cargo).

This preference for commercial aircraft is also supported by FAA regulations, see 33 Fed.Register 17,897, from which the Court quoted extensively in the *Port Authority* opinion. As the FAA stated:

> "When capacity limitations compel a choice, however, the public service offered by the common carrier must be preferred."

The second element which Judge Dooling considered in evaluating the legality of the Port Authority's $25.00 landing was whether the imposition of such fee resulted in a reasonable limitation of a particular airport use or the complete exclusion of that use.

In this regard, Judge Dooling made specific note of two points in his discussion concerning the reasonableness of the fee imposed: (1) the fact that the fee was not in effect at all times, but only at certain peak traffic hours; and (2) the fact that even with the imposition of the higher fee, some general aviation activity continued during such peak traffic periods. As the Court observed:

> "The fee schedule, however, . . . does not exclude any General Aviation aircraft from the three major airports either during off-peak hours or even during peak hours." 305 F.Supp. at p. 107.

The Court's care in noting that no outright exclusion of any class of aeronautical use was involved in the case demonstrates that such an outright exclusion, if permis-

sible at all, would certainly bear a heavy burden of justification.

In the case at bar, Plaintiffs have attempted to subject the priorities which were so prominent in the *Port Authority* case to a radical inversion. In place of the preference accorded mass transportation in that case, Plaintiffs herein, in determining who shall have access to Love Field, have preferred private aircraft, corporate jets, unscheduled cargo flights, maintenance flights, and ferry flights over Southwest's commercial air service. Plaintiffs do not purport to maximize public access to a public airport supported by federal funds. Instead, they overtly declare their purpose to be the suppression of competition in pursuit of a purely economic advantage for the Regional Airport. As the 1968 Bond Ordinance itself states in Section 9.5A thereof:

> "It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA and Meacham Field, own and operate airports which by their nature are potentially competitive with the operation of the Regional Airport . . . . Accordingly, the Cities . . . shall take . . . steps . . . to provide for the orderly, efficient and effective phase out [of Certificated Air Carrier Services at the above named airports]."

This must be contrasted with the *Port Authority* case, where the justification for the restrictive action taken was a severe shortage of airport capacity, a situation which will not exist in the Dallas/Fort Worth Region in the foreseeable future and which makes mandatory a choice between different classes of rights.

It is readily apparent from the face of the 1968 Ordinance that the Cities' only reason for barring Southwest Airlines from Love Field is to avoid the potential competitive effect on the Regional Airport (*i.e.*, the CAB

carriers serving it), regardless of the public's interest in the continuance of convenient and economical short haul commuter air service. This attempted justification is directly contrary to the policy underlying the federal prohibition of the grant of an exclusive right at airports upon which federal funds have been expended. As then U.S. Attorney General Robert H. Jackson declared:

> "Legislative history shows that the purpose of the provision is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics in accordance with the policy of the Act * * * The grant of an exclusive right to use an airport for a particular aeronautical activity, such as an air carrier, falls within Section 303 proscribing any exclusive right for use of any landing area."

On the facts herein, the Court must conclude that a prima facie case of "unjust discrimination" and of the illegal grant of an "exclusive right" has been established and that Plaintiff's purported justifications therefor are inadequate.[7]

First, with respect to justification, Plaintiffs herein may not claim, as Defendant did in the *Port Authority* case, that the exclusion of Southwest from Love Field serves the "public interest." The TAC, which is charged

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[7] A prima facie case of unjust discrimination may be said to exist where, in the terms of the grant agreements, the Sponsor fails to "keep the Airport open to all types, kinds, and classes of aeronautical use without discrimination between such types, kinds, and classes . . ."

This interpretation of a prima facie case of unjust discrimination is consistent with the interpretation Courts have given that term under Sec. 1374(b) in passenger cases. In those decisions, the Courts have held that a preference for one passenger over another makes out a prima facie case of "unjust discrimination" sufficient to impose the burden of justification on the air carrier. See Archibald v. Pan American Airways, Inc., 460 F.2d 14, 16 (9th Cir. 1972). *Cf.* Wills v. Trans World Airlines, Inc., 200 F.Supp. 360 (S.D.Cal. 1961).

by statute with determining the public convenience and necessity in the area of intrastate air transportation, has granted Southwest a certificate empowering it to serve "any" airport of its choice in the Dallas/Fort Worth area and, through Minute Order No. 22, has prohibited Southwest from discontinuing service to Love Field. The Commission's judgment in these matters is not subject to challenge before this Court. Although Plaintiffs appear before the CAB with respect to the amendment of the certificates of the interstate air carriers so as to designate single airport service, they have not attempted to secure similar action by the TAC concerning Southwest. The TAC's existing determination that the public interest requires Southwest to serve Love Field must therefore be deemed conclusive and not subject to collateral attack in this action. See Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., 418 F.2d 387, 398-399 (5th Cir. 1969), cert. denied, 397 U.S. 910, 90 S.Ct. 907, 25 L.Ed.2d 90 (1970); Thompson et al. v. Texas Mexican Ry. Co., 328 U.S. 134, 66 S.Ct. 937, 90 L.Ed. 1132 (1946).

Secondly, Plaintiffs' purely economic justification for excluding Southwest Airlines from Love Field must yield to the recognized preference for commercial air traffic and to the TAC's determination of where the public interest lies in the area of intrastate air transportation.

Thirdly, Plaintiffs' unsystematic classification discriminates not only between different types and kinds of aeronautical use, but also between uses within the same general class as well. Such discrimination is particularly objectionable because of the anti-competitive effects it has on the airlines and the public they serve.[8] Plaintiffs

[8] The uncontroverted evidence shows that Southwest's presence in the short-haul market, and particularly at close-in Hobby Airport in Houston, has generated vigorous competition among the various carriers on the routes which Southwest serves, resulting in a greatly expanded short-haul commuter market and in very substantial savings to the traveling public.

have broken up the class of commerical passenger service into several subclasses with no consistent rationale throughout. Charter flights, which may use larger or smaller aircraft than Southwest Airlines, may remain at Love Field, while Southwest Airlines must go. Air taxis, which hold certificates of public convenience and necessity from the TAC, may stay at Love Field although they operate a short-haul passenger service according to published flight schedules. However, Southwest Airlines, which holds the same kind of certificate from the TAC and also operates a short-haul passenger service according to published flight schedules, must go.[9]

Most egregious of all is the distinction the 1968 Ordinance makes between the carriage of intrastate passengers by Southwest Airlines and the carriage of such passengers by its CAB certificated competitors. As discussed above, this is a per se discrimination clearly violative of the federal statutes.

Finally, the attempt to exclude Southwest Airlines from Love Field is particularly irrational and inherently "un-

[9] This distinction between air taxis and Southwest Airlines is even less defensible when one considers that the air taxis carry interline passengers, destined out of state, who must connect with CAB carriers to complete their journeys, while Southwest is prohibited by law from carrying interstate connecting passengers. This difference in carrier authority would militate strongly in favor of removing the air taxis to the Regional Airport so that they will be near the CAB carriers, *cf.*, Aircraft Owners and Pilots Association v. Port Authority, *supra*, 305 F.Supp. at 107, and allowing Southwest to remain at Love Field, rather than the reverse.

The only other difference between Southwest Airlines and the air taxis is the size of the aircraft each uses. Even this has been blurred, however, as the result of a recent (September, 1972) change in the CAB regulations which permits air taxi operators to utilize aircraft with a maximum capacity of 30 passengers and a maximum payload (passengers, baggage, and freight) of 7,500 pounds. Thus, for the first time, these carriers can effectively compete with Southwest Airlines, especially if Southwest is forced to operate from the distant Regional Airport, while the air taxis use Love Field.

just" because it removes to a more remote airport the one kind of passenger service which has most need of a close-in airport. It is virtually undisputed that short-haul air service of the type involved in Southwest's only markets is far more vulnerable to competition from private automobiles, buses, and trains than long haul air service. As a result, the increased passenger ground transportation time and expense resulting from using an inconvenient airport is more likely to discourage a short-haul, intrastate commuting passenger from using the airways than a long haul interstate passenger, in whose case the time and expense of going to and from an airport constitutes only a relatively small part of his total trip time and expense. Considerable evidence presented at the trial showed that travel time and expense to the Regional Airport will be significantly greater for the vast majority of air travelers in the Dallas-Fort Worth area than travel time and expense to Love Field and that an overwhelming majority of Southwest's passengers preferred Love Field. It also showed that none of the Plaintiffs had studied this problem or surveyed passenger preferences and that elsewhere in the country, where dual airport services existed, the short-haul commuter carriers were authorized to serve the close-in airport while long haul service was provided through the outlying airport. Consequently, this Court concludes that excluding Southwest's strictly short haul service from Love Field, while allowing long haul flights by charter carriers, corporate jets, and others to remain there, is unjustly discriminatory within the meaning of the federal stautes, and improperly grants an exclusive right to the aircraft users who will be eligible to use Love Field after the Regional Airport opens. See 40 Op.A.G. 71 (June 4, 1941).[10]

[10] In addition to the federal statutes discussed above, Defendant has argued that its proposed exclusion from Love Field violates 49 U.S.C. Sec. 1374(b); the equal protection clause of the United States Constitution, its right to travel, and its right of access to the navigable airspace of the United States. Defendant has also argued that the Dallas Ordinance discriminates against its passengers on the basis of wealth. The Court finds no need to reach and decide these points due to the disposition of Defendant's claims on other grounds.

Wholly apart from the federal grounds set forth above, the exclusion of Southwest from Love Field is prohibited by state law.

The City of Dallas, owner and operator of Love Field, is a creation of the State of Texas, and, under the Texas Constitution, may only enact ordinances and charter provisions which do not:

> ". . . contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; . . .." Texas Constitution, Art. 11, Sec. 5, Vernon's Ann.St.[11]

Additionally, the State has expressly granted the city certain powers to regulate airports pursuant to the Municipal Airports Act, Art. 46d-1 through 46d-22, V.A.C.S. This power to regulate airports is, however, specifically circumscribed by the same Municipal Airports Act:

> "(b) Conformity to Federal and State law. No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States *or laws of this State, or to any regulations promulgated or standards established pursuant thereto.*" (emphasis added) Art. 46d-7(b) V.A.C.S.

Plaintiffs' attempted exclusion of Southwest from The Texas Aeronautics Commission has intervened in

[11] See also, Art. 1165, V.A.C.S., relating to Home Rule Cities, which provides in pertinent part: "No charter or any ordinances passed under said charter shall contain any provision inconsistent with the Constitution or general laws of this state."

this matter and adopted the contentions of Southwest Airlines. It most specifically urges that the Plaintiffs' attempted exclusion of Southwest from Love Field is illegal as being, first, beyond the power of the Plaintiffs' and, second, in direct conflict with regulations promulgated pursuant to the laws of the State of Texas.

The Texas Aeronautics Act, Art. 46c-1 et seq., V.A.C.S., delegates to the TAC the unqualified authority to regulate scheduled intrastate carriers and directs it to consider "the encouragement and development of an intrastate air transportation system properly adapted to the present and future needs of the State of Texas." Art. 46c-6, Subd. 3(b), V.A.C.S. In conducting its regulatory activities, the TAC is charged with determining, and providing for, the public convenience and necessity of the citizens of the *entire State* with respect to routes, fares, schedules, and all other relevant aspects of intrastate air service or proposed air service. Plaintiff Cities neither conducted polls nor made investigations or held hearings of any kind to determine *public* convenience and necessity insofar as the Dallas/Houston, Dallas/San Antonio flights of Southwest are concerned, and it might be pointed out that such investigation would involve air travelers of Houston and San Antonio as well as those of Dallas. Indeed, the governing bodies of the Cities would have neither the time nor the expertise to hold hearings and make such determinations. Beyond any question, the TAC is the sole authority for the purpose of determining the public interest and needs with respect to Texas intrastate air service. Texas Aeronautics Commission v. Braniff Airways, Inc., 454 S.W.2d 199 at 201 (Tex.Sup.1970).

Any effort by Plaintiffs to regulate the service of a TAC carrier (*e.g.*, Southwest Airlines) impinges upon the jurisdiction of the TAC and is therefore invalid under Art. 11, Sec. 5 of the Texas Constitution, Art. 1165,

V.A.C.S. and Art. 46d-7(b), V.A.C.S.[12] Moreover, the conflict between state and municipality in the instant case is even more direct. The TAC granted Southwest a Certificate of Public Convenience and Necessity to serve Dallas, Texas, through "any" airport in the area. Subsequently, the TAC ordered Southwest not to discontinue service to any airport then being served, without the prior approval of the TAC. TAC Minute Order No. 22,

[12] Defendants point out that the regulation of intrastate carriers under the guise of regulating airports could have a very substantial effect upon aeronautical activity in the State as a whole; *e.g.*, should Dallas be permitted to refuse Southwest Airlines access to Love Field, the effect would be felt not only by the citizens of Dallas, but also by the citizens of Houston and San Antonio. They further point out that there are approximately 200 municipal airports in the State of Texas and that, if each municipality were permitted to limit the use of its airport as it wishes, then there would, in effect, be 200 regulatory bodies empowered to determine "the present and future needs of the State of Texas." No intrastate air transportation system could possibly be developed under such chaotic regulatory conditions, and the rationale for a single state agency to regulate all aspects of intrastate air service is obvious.

Additionally, Southwest's type of air service is unique to the State of Texas and was inaugurated only after three and one-half years of litigation involving questions of public convenience and necessity, among others. Southwest's President testified that the Company would not be in existence today had it continued to serve Houston's out-lying Intercontinental Airport rather than Houston's close-in Hobby Airport. It would ill-suit the public convenience and necessity of the citizens of the State if Dallas were permittel to force Southwest to the Regional Airport, thereby causing the demise of a Company which offered convincing evidence at the trial that it has provided superior commuter air service at lower fares. The Court makes no findings of fact on this issue, which is discussed simply in order to illustrate why the TAC, which has experience and expertise in such matters, should make the final determination concerning them. See Thompson et al. v. Texas Mexican Ry. Co., 328 U.S. 134, 66 S.Ct. 937, 90 L.Ed. 1132 (1946) and the September 2, 1969 Opinion of the Texas Attorney General wherein he states that the Texas Aeronautics Act "subpordinates, so far as for-hire air transportation is concerned, the general power of cities to regulate commerce within their boundaries." See also City of Dallas et al. v. CAB, 944 U.S.App.D.C. 175, 221 F.2d 501 (1954), cert. denied, 348 U.S. 914, 75 S.Ct. 295, 99 L.Ed. 717.

November 12, 1971. On November 12, 1971, Southwest was serving Love Field. The granting of the Certificate and the promulgation of Minute Order No. 22 establish the determination of the TAC that the public's convenience and necessity require that Southwest continue serving Dallas through Love Field. Plaintiff's attempt to ignore the actions and jurisdictions of the TAC, by requiring Southwest to cease providing service through Love Field, is in direct conflict with such actions and jurisdiction and, therefore, beyond Plaintiffs' powers. There is abundant authority establishing that in conflicts between municipalities and regulatory agencies, both creations of the State of Texas, the regulatory agency must prevail. City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927); City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927).

For the foregoing reasons, the Court concludes: (1) That determinations of public convenience and necessity respecting intrastate air commerce are exclusively within the jurisdiction of the TAC; (2) that exclusion of Southwest Airlines from Love Field constitutes an impermissible assumption by Plaintiffs of the power to amend Southwest Airlines' certificate of public convenience and necessity, contrary to the exclusive powers over such certificates conferred upon the Texas Aeronautics Commission by the Texas Aeronautics Act; and (3) that Section 9.5 of the 1968 Regional Airport Concurrent Bond Ordinance and the ordinances supplemental thereto are in conflict with, and must yield to, the TAC's Minute Order No. 22, insofar as these Ordinances purport to authorize the exclusion of Southwest Airlines from Love Field.

Finally, the Plaintiffs are prohibited from excluding Southwest Airlines from Love Field by prior legal commitments and covenants entered into by the City of Dallas. The City has issued several series of Airport

Revenue Bonds for the purpose of financing construction at Love Field. In at least three of these series (364, 401, 409), some $8.9 million of which are presently outstanding and unpaid, the City covenanted with the bondholders (including Southwest Airlines) as follows:

> "That while any of the Revenue Bonds or interest thereon are outstanding and unpaid, the City will continue to operate and maintain or cause to be operated and maintained the Airport [Love Field] as an airport for the accomodation of *scheduled airlines* serving the City . . . " (emphasis added)

In addition to the Love Field Airport Revenue Bonds, Dallas has sold several series (363, 370, 371, and 390) of Love Field Maintenance Base Bonds, of which approximately $25 million are outstanding and unpaid and in which it covenanted with the bondholders as follows:

> "The City will continuously operate its Airport at Love Field, and will not cause or suffer curtailment of the *general* use thereof so long as any of the Revenue Bonds or any interest thereon remains outstanding and unpaid." (emphasis added)

The exclusion of Southwest Airlines from Love Field would breach each of these covenants. The fact that circumstances may have changed and that Dallas would now like to ignore its prior covenants does not provide an adequate basis for the City's proposed action. Such obligations are binding and the City must adhere to them. City of Houston v. Mann, 139 Tex. 640, 164 S. W.2d 548 (1942).

The Plaintiffs assert that the covenants in the Love Field Airport Revenue Bonds are satisfied by making these three series of bonds senior to the Dallas/Fort Worth Regional Airport Bonds with respect to Regional Airport revenues. It is quite clear from the language of these covenants, however, that such an interpretation

has no merit. Furthermore, even if such interpretation were meritorious, the City's proposed actions would still be precluded by the covenants in the four series of Love Field Maintenance Base Bonds.

In reaching its decision, the Court finds it unnecessary to invalidate Section 9.5 of the 1968 Regional Airport Concurrent Bond Ordinance, since that Ordinance authorizes Plaintiffs to phase out Certificated Air Carrier Services only to the extent that such action is "legally permissible" and not in violation of "presently outstanding legal commitments or covenants prohibiting such action." Since the Court has found that the exclusion of Southwest Airlines from Love Field would not be legally permissible, in part because it would violate presently outstanding legal commitments or covenants, the phase-out provision of the Ordinance is declared not applicable to Southwest Airlines.

As the Court is confident that Plaintiffs will abide by its ruling in this case and not attempt to interfere with or burden Southwest's right to use Love Field, an injunction to enforce its decree is deemed unnecessary.

It is accordingly ordered and declared that Plaintiffs herein may not lawfully exclude Defendant, Southwest Airlines Co., from the use of Love Field, Dallas, Texas, and its airport facilities so long as Love Field remains open as an airport.

APPENDIX E

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

UNITED STATES CODE, TITLE 28, SECTION 2283

Stay of State Court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968.

APPENDIX G

TEXAS CONSTITUTION, ARTICLE 11, SECTION 5 MUNICIPAL CORPORATIONS

§ 5. Cities of 5000 or more population; adoption or amendment of charters; taxes; debt restrictions

Sec. 5. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years. As amended Aug. 3, 1909, proclamation Sept. 24, 1909; Nov. 5, 1912, proclamation Dec. 30, 1912.

APPENDIX H

TEXAS AERONAUTICS COMMISSION ACT, TEXAS REVISED CIVIL STATUTES ANNOTATED, ARTICLE 46c-6, SUBDIVISIONS 1 AND 3

Commission Powers and Duties

Subdivision 1. General. The Commission, and its Director acting under its authority, is empowered and directed to encourage, foster, and assist in the development of aeronautics in this state and to encourage, aid, and assist in the establishment of airports and airstrips and air navigational facilities in this state, and, as to lands, or portions thereof, or navigational aids or facilities donated or given to the state, or to the Texas Aeronautics Commission to be held by it in trust for the state, the Texas Aeronautics Commission may control, administer, and have jurisdiction thereover, and may lease the same on the terms hereafter provided. The Commission and its Director may cooperate with and assist the United States, municipalities or other governmental subdivisions of this state, or persons engaged in aeronautics or in the development of aeronautics, and may endeavor to coordinate the aeronautical activities of such others, and, municipalities and governmental subdivisions are authorized to cooperate with the Commission in the development of aeronautics and aeronautical navigational facilities or aids in this state.

* * *

Subdivision 3. Air Carriers. (a) The Commission is hereby granted and vested with the right, power and authority to promulgate and administer economic and safety rules and regulations over air carriers. The Commission shall be vested with broad discretion in promulgating such rules and regulations. Without limiting the right, power and authority of the Commission, to the extent necessary to enable it to perform its functions,

it may approve or disapprove the maximum or minimum or maximum and minimum rates, fares and charges of each air carrier, require filing of such reports and other data of air carriers as the Commission may deem necessary, and adopt a program, rules and regulations necessary to effectuate its duties hereunder.

(b) No air carrier shall operate as such, after this Act goes into effect, without having first obtained from the Commission a certificate of public convenience and necessity pursuant to a determination by the Commission that its proposed service is in the interest of public convenience and necessity; provided, however, that all operating rights and privileges granted to any air carrier by the Commission prior to the passage of this Act shall continue in effect, authorizing the same service under the same terms and conditions as previously granted by the Commission. Upon notice and hearing, certificates of public convenience and necessity shall be subject to revocation or suspension for violation of the Commission's regulations, the provisions of this Act or the regulations or laws of the United States or any authorized agency or board thereof. Any such certificate so revoked or suspended may be reinstated upon order of the Commission on its own motion or upon applications of the air carrier, when the Commission finds reinstatement to be in the public interest. In determining the existence of a public convenience and necessity for a proposed air service, the Commission shall consider the encouragement and development of an intrastate air transportation system properly adapted to the present and future needs of the State of Texas, and in addition shall consider the financial responsibility of the air carrier, its proposed routes and rates or charges, the effect, if any, upon existing air carriers and CAB certificated carriers, and any other factors similarly related to public convenience and necessity. Nothing in this Act affects any litigation pending on the effective date of this Act.

(c) No application for a certificate shall be received and filed by the Commission unless the same shall be in writing under oath in original and six copies filed with the Director of the Commission and contain the following information:

(1) The name and address of the applicant and the names and addresses of its officers, if any, and full information concerning the financial condition and physical properties of the applicant.

(2) The complete route or routes over which the applicant desires to operate, together with the description of each aircraft which the applicant intends to use.

(3) A proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served.

(4) It shall be accompanied by plats or maps showing the route or routes over which the applicant desires to operate, on which plats or maps shall be delineated the line or lines of any existing air carrier or airlines, whether or not subject to this Act, serving such territory, and shall point out the need for additional air service.

(5) Such other information, exhibits and other data in regard to the application as may be required by duly promulgated rules and regulations of the Commission.

(6) Every application filed with the Commission for a certificate shall be accompanied by a filing fee in the sum of $50, which fee shall be in addition to any other fees and taxes and shall be retained by the Commission, whether the application is approved or not, to defray operating expenses.

Copies of such application shall be transmitted contemporaneously by certified mail, return receipt requested, to the Civil Aeronautics Board, the Federal Aviation Ad-

ministration and to any air carrier or CAB certificated carrier, which serves, or is authorized to serve, over the routes proposed to be served by the applicant, or any portion, thereof. Upon receipt of such application in proper form, the Commission shall set a date for public hearing which may be conducted by the Commission, or at its discretion, by the Director, or any staff member of the Commission.

Any other provision of this Act notwithstanding, carriers certificated by the Civil Aeronautics Board pursuant to the Federal Aviation Act of 1958, as now or hereafter amended,[1] together with any other interested party shall be afforded the right to appear and present evidence and arguments at such hearing on all issues involved in any such hearing. The final determination of such application shall be made by the Commission by written order setting forth its findings and served upon the parties in such manner as the Commission shall specify, and such application may be granted or denied, in whole, or in part; provided, however, any service not specifically authorized shall be deemed specifically denied. The order of the Commission granting any application and the certificate issued thereunder shall be voidable upon appeal unless the Commission shall set forth in its order full and complete findings of fact pointing out in detail the basis on which it made each of its findings on the factors related to public convenience and necessity as provided in Subsection (b) of this Subdivision.

(d) Any certificate held, owned or obtained by any air carrier operating under the provisions of this Act may be sold, assigned, leased, transferred or inherited; provided, however, that any proposed sale, lease, assignment or transfer shall be first presented in writing to the Commission for its approval or disapproval and after public notice and public hearing the Commission may disapprove such proposed sale, assignment, lease or transfer if it is found and determined by the Commission that such pro-

posed sale, assignment, lease or transfer is not in good faith or that the proposed purchaser, assignee, leasee or transferee is not in good faith or that the proposed purchaser, assignee, leasee, or transferee is not able or capable of continuing the operation of the equipment proposed to be sold, assigned, leased or transferred in such manner as to render the services demanded by the public convenience and necessity of and along a designated route, or that the proposed sale, assignment, lease or transfer is not in the best public interest. The Commission in approving or disapproving any sale, assignment, lease or transfer of any certificate may take into consideration all the requirements and qualifications of a regular applicant required in this Act and apply the same as necessary qualifications of any proposed purchaser, assignee, leasee or transferee. Every application filed with the Commission for an order approving the lease, sale or transfer of any certificate of convenience and necessity shall be accompanied by a filing fee in the sum of $25, which fee shall be in addition to any other fees and taxes and shall be retained by the Commission whether the lease, sale or transfer of the certificate is approved or not.

(e) If any air carrier, or other party in interest be adversely affected by any decision, rate, charge, order, rule, act or regulation adopted by the Commission, that party, after failing to get relief from the Commission, may file a petition setting forth its particular objections to the actions of the Commission in the District Court of Travis County, Texas, against the Commission as defendant. This action shall have precedence over all other causes on the docket of a different nature. In an appeal of a Commission action other than revocation or suspension of a certificate, the Commission action shall be sustained unless there is no substantial evidence to support it. An appeal of the revocation or suspension of a certificate shall be tried in the same manner as appeals

from justice court to the county court. Appeals from any final judgment of the District Court may be taken by any party to the cause in the manner provided for in civil actions generally, but no appeal bond shall be required of the Commission.

(f) Every officer, agent, servant, or employee of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this Act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand or requirement of the Commission shall be subject to and shall pay a penalty not exceeding $100 for each and every day of such violation. The penalty shall be recovered in any court of competent jurisdiction in the county in which the violation occurs. Suit for the penalty or penalties shall be instituted and conducted by the Attorney General of the State of Texas, or by the county or district attorney in the county in which the violation occurs in the name of the State of Texas. Upon violation of any provision of this Act, or upon the violation of any rule, regulation, order or decree of the Commission promulgated under the terms of this Act, any district court of any county where such violation occurs shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this Act or from further violating any of the rules, regulations, orders, and decrees of the Commission. Such injunctive relief may be granted upon the application of the Commission, the attorney general, or any district or county attorney or competing air carrier. No bond shall be required when such injunctive relief is sought upon the application of the Commission, attorney general or any district or county attorney. Such relief may be granted in suits for penalties as provided in this section, but suit for penalties shall not be a condition precedent to the injunctive relief provided hereby.

APPENDIX I

TEXAS MUNICIPAL AIRPORTS ACT
TEXAS REVISED CIVIL STATUTES ANNOTATED, ARTICLE 46d-7

Regulations and jurisdiction

(a) Scope. A municipality, which has established or acquired or which may hereafter establish or acquire an airport or air navigation facility, is authorized to adopt, amend and repeal such reasonable ordinances, resolutions, rules, regulations and orders as it shall deem necessary for the management, government and use of such airport or air navigation facility under its control, whether situated within or without the territorial limits of the municipality. For the enforcement thereof, the municipality, may, by ordinance or resolution, as may by law be appropriate, appoint airport guards or police, with full police powers, and fix penalties, within the limits prescribed by law, for the violation of the aforesaid ordinances, resolutions, rules, regulations and orders. Said penalties shall be enforced in the same manner in which penalties prescribed by other ordinances, or resolutions of the municipality are enforced. To the extent that an airport or other air navigation facility controlled and operated by a municipality is located outside the territorial limits of the municipality, it shall, subject to Federal and State laws, rules and regulations, be under the jurisdiction and control of the municipality controlling or operating it, and no other municipality shall have any authority to charge or exact a license fee or occupation tax for operations thereon.

(b) Conformity to Federal and State Law. No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act [1] shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established pursuant thereto. **Acts 1947, 50th Leg. p. 186, ch. 114, § 7.**

APPENDIX J

1968 REGIONAL AIRPORT CONCURRENT BOND ORDINANCE OF THE CITIES OF DALLAS AND FORT WORTH, SECTIONS 2.1G AND 9.5A

SECTION 2.1.

* * * *

G. "CERTIFICATED AIR CARRIER SERVICES" mean aircraft operations of the following types when operating on a regular and continuing basis, to-wit:

(1) interstate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Civil Aeronautics Board of the United States of America or any successor agency thereto;

(2) services conducted by foreign air carriers according to published flight schedules holding permits or similar evidences of authority issued by the Civil Aeronautics Board or any successor agency thereto or by any other agency or department of the United States of America; and

(3) intrastate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Texas Aeronautics Commission of the State of Texas or by any successor agency.

It is provided, however, that this term shall not include services provided by commercial "air taxi" operators meeting the requirements for exemption provision from time to time by any rules and regulations of the Civil Aeronautics Board, by the Texas Aeronautics Commission or by any other agency of the United States of

America or the State of Texas having jurisdiction to provide such exemptions.

* * * *

SECTION 9.5. *Competition, Optimum Airport Development.*

A. It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA and Meacham Field, own and operate airports which by their nature are potentially competitive with the operation of the Regional Airport. It is further acknowledged and recognized that the revenues to be derived from those airport facilities are not, under the terms of this Ordinance, pledged to the payment of the Bonds, except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.

From time to time hereafter, the Board may review the effect and application of such covenant, and, by concurring action of not less than eight (8) of its members, the Board may reasonably limit its scope and effect and may waive its application in specific instances if it shall first determine that such action is necessary (1) in the interest of the public safety; (2) in the interest of prudent and efficient operations at the Regional Airport; or (3) in the interest of satisfying an overriding public

need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole. However, in order to promote, by voluntary agreement, the full use of the Regional Airport at the earliest practicable date by commercial air carriers, the Board shall be authorized to establish policies and to make uniformly applicable and non-discriminatory agreements with air carriers regarding the instances, if any, in which the above power granted to the Board will or will not be exercised, and no limitations on such covenant shall be promulgated or its application in specific instances waived if the result thereof would be to violate such agreements. And in no event, by agreement with air carriers or otherwise, shall limitations or waivers of such covenant allowing a commencement or resumption of Certificated Air Carrier Services at any other airport or airports be adopted if the result thereof would be the reduction in Pledged Revenues below the amount required to satisfy the provisions of Section 9.4 hereof, unless the City (or the Cities in the case of more than one airport) shall also pledge to the payment of all Bonds, by appropriate official action, such part of the revenues from the airport or airports to which such services are to be transferred, resumed or originally commenced, as will justly compensate the Regional Airport (at rates then in effect thereat for similar services), for the loss of such services and the gross Revenues therefrom.

The Board's power under this paragraph shall not include the power to order or direct that specific Aircraft uses be placed at other specific airports unless the owner thereof shall consent to such action or unless such other airport is, or airports are, at the time subject to the control and jurisdiction of the Board.

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1773

TEXAS INTERNATIONAL AIRLINES, INC., et al.,
Petitioners,

v.

SOUTHWEST AIRLINES CO., and
THE TEXAS AERONAUTICS COMMISSION,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT SOUTHWEST AIRLINES CO. IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is reported at 396 F. Supp. 678. The opinion of the United States Court of Appeals for the Fifth Circuit, review of which petitioners seek, is reported at 546 F. 2d 84.

The opinion of the District Court in *City of Dallas, Texas, et*

al. v. Southwest Airlines Co., et al., declaring certain of the rights of respondent which petitioners have attempted to relitigate in state court, is reported at 371 F. Supp. 1015. The opinion of the United States Court of Appeals for the Fifth Circuit affirming that decision is reported at 494 F. 2d 773.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Does the Due Process Clause guarantee the right of a private party, with no personal or peculiar legal claim, to seek judicial enforcement of a public ordinance against another private litigant, after the governmental unit responsible for enacting the ordinance has been prohibited in prior litigation from enforcing that ordinance against the same litigant?

2. Do principles of comity prohibit a federal court from enjoining state court litigation in order to protect and effectuate a prior federal judgment based on settled principles of state law, rendered in a suit brought by units of state government under the court's federal question jurisdiction?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Amendment V. (Appendix E to Petition).

2. Title 28, United States Code, Section 2283. (Appendix F to Petition).

3. Texas Constitution, Article 11, Section 5. (Appendix G to Petition).

4. Texas Aeronautics Commission Act, Texas Revised Civil Statutes Annotated, Article 46c-6, Subdivisions 1 and 3. (Appendix H to Petition).

5. Texas Municipal Airports Act, Texas Revised Civil Statutes Annotated, Article 46d-7. (Appendix I to Petition).

6. 1968 Regional Airport Concurrent Bond Ordinance of the Cities of Dallas and Ft. Worth. (Sections 2.1G and 9.5A Reprinted in Appendix J to Petition).

STATEMENT OF THE CASE

Southwest Airlines Co. ("Southwest" or "Southwest Airlines") sets forth its own Statement of the Case in order to correct inaccuracies and to supply omissions in petitioners' Statement.

This is the third manifestation before this Court of the decade long, and seemingly unending, series of lawsuits fostered by Civil Aeronautics Board ("CAB") certificated air carriers with a view toward eliminating their intrastate competitor, Southwest Airlines. Staggering as they are, the reported decisions constitute

only the prominence of a mountain of unreported administrative and judicial determinations costing Southwest, *in toto,* well in excess of $2,500,000 in legal fees and expenses. *Southwest Airlines Co. vs. Texas International Airlines, Inc., et al.,* 396 F. Supp. 678 (N.D. Tex. 1975) , aff'd 546 F.2d 84 (5th Cir. 1977), on pet. for cert.; *City of Dallas, Texas, et al. vs. Southwest Airlines Co., et al.,* 371 F. Supp. 1015 (.N.D. Tex. 1973), aff'd 494 F2d 773 (5th Cir. 1974). cert. den'd. 419 U.S. 1079 (1974) ("Southwest I"); *Texas Aeronautics Commission, et al. vs. Braniff Airways, Inc., et al.,* 439 S.W.2d 699 (Tex.Civ.App. - Austin, 1969) , rev'd 454 S.W.2d 199 (Tex. Sup. 1970) , cert. den'd. 400 U.S. 943 (1970); *Texas International Airlines, Inc., et al. vs. Civil Aeronautics Board, et al.,* 473 F.2d 1150 (D.C. Cir. 1972); *Texas Aeronautics Commission, et al. vs. Betts,* 469 S.W.2d 394 (Tex. Sup. 1971).

A judge of the United States Court of Appeals for the District of Columbia Circuit and the Civil Aeronautics Board itself have characterized the actions of its carriers in terms of "harassment." *Texas International Airlines, Inc., et al. vs. Civil Aeronautics Board, et al., supra* at 1156; CAB Order No. 72-6-12. The Texas Supreme Court has been compelled to prohibit one of its Austin District Court judges from granting repeated and excessive injunctive relief against Southwest Airlines, stating:

> . . . However, the limited record before us shows that Southwest proposed to operate in compliance with the provisions of Certificate Number 22, and is in violation of no rule of the Commission or law of the State of Texas or the United States. The injunctive relief requested in the trial court and that granted is unnecessary. It interferes with this court's former judgment which this court will not allow. The order of June 16, 1971, has now expired, but we order that the trial court cease further interference with this court's former judgment by granting injunctive relief. *Texas Aeronautics Commission, et al. vs. Betts,* 469 S.W.2d 394, 399 (Tex. Sup. 1971)

And, at the instance of the United States Department of Justice and as a consequence of their anticompetitive actions against Southwest, several of the CAB carriers are presently under grand jury investigation for violation of the federal antitrust laws.

Judge Wisdom states in the "Conclusion" to his opinion below:

> This is the eighth time in three years that a federal court has refused to support the eviction of Southwest Airlines from Love Field. Precisely worded holdings and deference to state authorities by the federal judiciary have only generated more suits, appeals, and petitions for rehearings. . . . " 546 F.2d at 102 (Pet. App. 35a)

The immense penumbra hanging over this case explains why this is so.

Narrowly viewed, this litigation concerns only Southwest's exercise of its "federally declared right"[1] to provide intrastate commuter air service through Dallas' downtown airport, Love Field ("Love") , rather than through the outlying Dallas-Fort Worth Regional Airport ("DFW") , without the harassment of repeated litigation designed to overturn the federal courts' declaration of that right. In comparison to District of Columbia air service, Love Field is the equivalent of Washington's National Airport, through which Eastern Airlines provides its New York and Boston shuttle service, and DFW is the equivalent of Virginia's Dulles Airport, through which long haul flights to and from Washington are provided. (R. 595)*

[1] 546 F.2d at 103 (Petitioners' Appendix 36a).

*Record references are to the printed Appendix filed in the Circuit Court of Appeals in Cause No. 73-2478, which was Cause No. 74-324 in this Court on prior Petition for Certiorari.

Eastern's short haul shuttle service could not possibly survive at Dulles, and Southwest's short haul commuter service could not survive at DFW. (R. 1473) During the CAB's Dallas-Fort Worth Regional Airport Investigation, Docket No. 13959, Braniff Airways, Inc. ("Braniff"), which is headquartered in the City of Dallas ("Dallas"), and the City of Dallas, as well, presented extensive evidence showing that Dallas generated approximately eight (8%) percent of the air passengers in the area and that short haul (under 300 miles) passenger traffic would be drastically inconvenienced and dramatically reduced if the CAB should designate Fort Worth's outlying Greater Southwest International Airport ("GSIA") as the sole CAB air carrier airport. (R. 1911-12; 4900-5088; 5095-5329) DFW is as far from Dallas as GSIA, and Braniff was the principal short haul carrier in the Dallas market prior to entry by Southwest. (R. 1419; 1426; 1913-14)

On June 18, 1971, Southwest commenced its air service to Houston through that City's outlying Intercontinental Airport. Only complete transference of such service to Houston's downtown Hobby Airport saved Southwest from bankruptcy. (R. 1298-99) Similarly, forcing Southwest to serve Dallas through DFW will bankrupt the airline. (R. 1473) That is why "narrowly viewed" this case concerns only Southwest's right to serve Love Field, but, broadly viewed, it concerns Southwest's right to survive. And it also concerns the right of the public to continue to receive far superior air service at fares approximately 50% below those normally charged for coach accommodations by the CAB air carriers, a comparison which has provided the primary impetus in the Congress for exposure of those carriers to more competition through deregulation of the entire interstate airline industry.

What are the discrete origins of the Love Field litigation itself?

In 1962, CAB certificated air carriers served the City of Fort Worth, Texas ("Fort Worth") through GSIA and Dallas through Love Field, although the two airports are only twelve air miles apart. (R. 1972) As testified to by Mr. Henry L. Newman, Director of the Southwest Region for the Federal Aviation Administation ("FAA"), such an arrangement became "an economic burden on the airlines to the point that the service to both cities was being jeopardized." (R. 544) In large part, as related by Mr. Newman, this burden resulted from the advent of commercial jet aircraft, which "are just a lot more costly. . . , it's just completely uneconomical for jets to make landings at such close proximity." (R. 958)

Motivated by their own economic problems, the CAB air carriers prevailed upon the CAB to institute the Dallas-Fort Worth Texas, Regional Airport Investigation, Docket No. 13959, which commenced on August 20, 1962, pursuant to CAB Order No. E-18719. (R. 1971) This Order recites that regional airport investigations are "a vital part of our effort to assist the air transportation industry to realize the full economic potential of its greatly expanded capacity in new high performance equipment. . . ."

Thereafter, the CAB held hearings in which the issue presented was whether or not the certificates of its carriers should be amended so as to require them to serve only Love Field or GSIA. The FAA appeared before the CAB and advocated selection by the CAB of GSIA as the sole CAB air carrier airport. (R. 896) Instead, the CAB granted Dallas and Fort Worth ("Cities") time to agree upon either GSIA or Love as such airport. Order No. E-21341. Because of inflamed municipal

rivalries, the Cities could not so agree and, hence, they decided to build gigantic DFW at Grapevine, Texas, which is midway between the two Cities and just north of GSIA. (R. 630; 1419; 1426) The CAB did not envision, nor order, the construction of DFW, and, in fact, it later terminated its Regional Airport Investigation without amending the certificates of its air carriers so as to require them to serve DFW. Order No. 73-9-82

When the FAA learned of this surprising DFW decision in September of 1965, Mr. Henry L. Newman flew to Washington, D.C., and, at an informal conference, obtained an oral commitment from General McKee, then Administrator of the FAA, for Federal grants under the Federal Airport Act of 1946, ch. 251, 60 Stat. 170. (R. 896) Mr. Newman testified that:

> . . .one of the things that General McKee said to me was this, " . . .whatever we do today means that we're committed to follow through on the development of this airport." (R. 897)

The first FAA grant to DFW, for land aquisition, was made on June 24, 1966. (R. 896)

The foundation for the statements made in footnote 1 on page 4 of the Petition, to effect that the FAA "insisted" on the closing of Love Field to scheduled flights as a prerequisite to the funding of DFW, is Mr. Newman's additional testimony that General McKee had one major question during their September, 1965 meeting: "What assurance do we have that this new airport is going to be used by the airlines?" (R. 897) Mr. Newman reportedly thereupon told General McKee:

> . . .very emphatically that it was the determination. . .that one of the basic commitments on this airport would be that if this airport was developed, that all of the airlines would transfer their activities to the new airport, and had it not been for that decision, the FAA would not have concurred in the development of this airport or the commitment to put the what is now 60 some million, and I assume will be substantially greater than that in the years to come. (R. 897)

This hearsay testimony as to an oral exchange between two FAA officials, wherein Mr. Newman apparently purported to speak for the air carriers, the CAB, and the Texas Aeronautics Commission ("TAC"), constitutes the only "evidence" in the entire history of this case of any federal "action" designed to insure that all airlines would serve DFW. There is no federal hearing, rule, regulation, decision, order, or grant agreement, by the FAA or the CAB, which requires either federal or state airlines to serve DFW. The initial FAA grant, committing the FAA "to follow through on the development of this airport," was made in 1966, long before *anyone* even attempted to insure that *any* air carrier would serve DFW. In short, the FAA never "insisted that it would not grant federal funds to DFW unless Love Field was closed to scheduled flights" and if, as petitioners state, "all parties recognized that unless Love Field was substantially closed to scheduled traffic it would be impossible to generate revenue at DFW sufficient to pay its cost," they were wrong. In fact, Braniff served Love Field in competition with Southwest after the opening of DFW; rented, from Dallas, additional space next to Southwest in the vacated American Airlines concourse so that it could compete more effectively; and commenced service between Love and Austin, Texas, a route which Southwest did not even serve. Texas International also served Love Field after DFW began operations. The certificates of the CAB air carriers today permit them to serve either DFW or Love Field, or both, at their discretion. No CAB air carrier has ever been ordered to leave Love or to serve DFW. Despite this

and the fact that Southwest Airlines has also been serving Love Field, DFW has not only been meeting all of its costs for the past three and one-half years of its operation, but recently reported a $1,254,856.27 refund to its carriers of excess landing fees previously paid to the Airport Board. Dallas-Fort Worth Airport, Annual Report for fiscal year ending September 30, 1975.

Having agreed upon the Grapevine location, the Cities proceeded to arrange funding for DFW. The citizens of Dallas County voted down financing for an autonomous Regional Airport Authority authorized by the Texas Constitution, whereupon the two City Councils, by contract, created the Dallas-Fort Worth Regional Airport Board ("Airport Board") to act as an administrative arm of both Cities with respect to the construction and operation of DFW. (R. 8-9; 1580-81; 4690-4707)

In November, 1968, the two Cities respectively adopted the 1968 Regional Airport Concurrent Bond Ordinance ("1968 Ordinance"), pursuant to which they sold $35,000,000 worth of revenue bonds. It is this public ordinance which the CAB carriers, as private parties, seek to invoke to force Southwest Airlines out of Love Field, even though the public body which adopted such ordinance, supposedly in the public interest, is foreclosed from so invoking it by final judgment.

The 1968 Ordinance adopted by Dallas represents the only relevant, legally significant action ever undertaken, by any federal or state governmental body or agency or, for that matter, by any private party, in an attempt to control and restrict the use of Love Field as such. Section 9.5 of this Ordinance makes it plain that such restrictions are not designed to enhance the public

convenience and necessity. nor to achieve safer and more efficient utilization of the air space. They are, purely and simply, designed to suppress free competition.

Section 9.5. Competition, Optimum Airport Development.

A. It is acknowledged and understood by the Cities that they, in *Love Field,* Redbird, GSIA and Meacham Feild, own and operate airports which by their nature are *potentially competitive with the operation of the Regional Airport.* It is further acknowledge and recognized that *the revenues to be derived from those airport facilities are not,* under the terms of this Ordinance, *pledged to the payment of the Bonds,* except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities, each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall *take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action) , to provide for the orderly, efficient and effective phase-out at Love Field,* Redbird, GSIA and Meacham Field, *of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport* effective upon the beginning of operations at the Regional Airport.

From time to time hereafter, the Board may review the effect and application of such covenant, and, by concurring action of not less than eight (8) of its members, *the Board may reasonably limit its scope and effect and may waive its application in specific instances* if it shall first determine that such action is necessary (1) in the interest of the *public saftey;* (2) in the interest of *prudent and efficient operations* at the Regional Airport; or (3) *in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole.* However, in order to promote, by voluntary agreement, the full use of the Regional Airport at the earliest practicable date by

commercial air carriers, *the Board shall be authorized* to establish policies and *to make* uniformly applicable and non-discriminatory *agreements with air carriers regarding the instances if any, in which the above power granted to the Board will or will not be exercised, and no limitations on such covenant shall be promulgated or its application in specific instances waived if the result thereof would be to violate such agreements. . . .*

B. In addition to the covenant of the Cities contained in paragraph A, next above, regarding the transfer of Certificated Air Carrier Services, the Cities further agree that they will through every legal and reasonable means *promote the optimum development* of the lands and Facilities comprising the *Regional Airport* at the earliest practicable date, *thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the Board will undertake with regard to* the Regional Airport, *Love Field,* GSIA, Meacham Field or Redbird, *any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and Facilities* at the earliest practicable date; , , , (emphasis added) (R. 2195-97)

In two sections, this remarkable city Ordinance not only attempts to restrain trade and commerce in Dallas, but also purports to usurp the powers of the FAA, of the CAB, and of the TAC by permitting the Airport Board to authorize resumption of "Certificated Air Carrier Services" at Love in the interest of "public safety," "prudent and efficient operations," or " an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region. . . ;" provided, however, that the Airport Board has not earlier entered into a contrary, supervening agreement with the CAB air carriers "regarding the instances, if any, in which the above power granted to the Board will or will not be exercised. . . ."

The "Certificated Air Carrier Services" referred to in Section 9.5 are defined in Section 2.1 G of the 1968 Ordinance to include all of the services furnished by Southwest but only the "interstate" services of the CAB air carriers, leaving them free to provide unregulated intrastate air service from Love Field after Southwest's intended demise. This less than subtle distinction was found by Judge Taylor in *Southwest I* to constitute unjust discrimination, 371 F.Supp. at 1027-31 (Pet. App. 19d-27d); and was referred to by the Fifth Circuit in its first opinion as "this curious and unpleasant feature of the ordinance." 494 F.2d at 775, n. 2 (Pet. App. 3c)

In 1970, each of the CAB carriers serving the Dallas-Fort Worth area entered into a separate Letter Agreement with the Airport Board. Each such Letter Agreement provides that the particular carrier executing the Agreement will underwrite any deficit arising from the operation of DFW, including all operations and maintenance expenses and 1.25 times the annual debt service on the DFW revenue bonds. (R. 3691) This is a common arrangement, which is in effect in Houston and San Antonio, as well as at many other old and new airports throughout the country. It is called the "cash drawer" method of financing an airport and guarantees the municipal owner against any drain on its general tax revenues for airport expenses.

The "cash drawer" type of agreement provides, in essence, that all revenues received at an airport from all tenants, such as restaurants, gift shops, rent car agencies, engine repair facilities, airplane fuelers, and the carriers themselves for terminal space rentals, will go into a single "drawer" to be matched against total airport expenses. If there is an excess of expenses over revenues, then the deficiency is made up by increasing air carrier landing fees. Correspondingly, if there is an excess of revenues over

expenses, air carrier landing fees are decreased, refunded, or credited, as was recently the case at DFW. There is nothing novel, or even unusual, about the financing arrangements entered into between the CAB carriers and the Airport Board in order that the carriers might divest themselves of the onerous economic burden of serving, with jet equipment, two airports but twelve air miles apart. The only novelty here is that they are insisting that Southwest must help them with their project. A perfect analogy would be if a developer joint ventured an immense shopping mall with Gimbels and Woolco and then insisted that all the stores in town must rent space in order to help Gimbels and Woolco with the operating expenses and debt service they were carrying.

The Letter Agreements simply establish a mutually beneficial financing arrangement by which the CAB air carriers receive lower interest rates on the construction of needed airport facilities, because the bonds in question are tax free municipals, and the Cities are provided with suitable airport accommodations with a lessened financial risk on their part. (R. 1558; 1561; 1572-73; 1816) At the first Love Field trial, the attorney for the City of Dallas referred to the CAB air carriers as "partners" and the Director of Finance for DFW testified with respect to this arrangement as follows:

> Q. Isn't it true, Mr. Laman, that really what you have done out there at the Regional Airport is to make all of the [CAB] airlines a partner in the airport itself, in effect?
>
> A. That's correct. (R. 1758)

Under their "cash drawer" Letter Agreements, there may come a day when the CAB carriers pay no landing fees at DFW.

Furthermore, the contents of the individual and separate Letter Agreements, as they pertain to service requirements, are

not correctly quoted on page 4 of the Petition. Each CAB carrier, in its separate and individual Letter Agreement, agreed that "*it* shall move all of *its* Certificated Air Carrier Services serving the Dallas-Fort Worth area to the Airport, and thereafter shall conduct such services to, from and at the Airport to the extent required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance." (R. 3691) There is no requirement that *any other* carrier transfer its services to DFW as a condition to the effectiveness and enforceability of the Letter Agreement, and there is no requirement that the CAB carriers transfer their intrastate services to DFW, since the Letter Agreement simply imports the terms and conditions of the 1968 Ordinance, already discussed. As a matter of law, the financial interests of the CAB carriers in DFW are no different from those of the taxi drivers who serve the airport, the news vendors who sell newspapers on its premises, the bartenders who serve drinks in its bars, and the restaurants which serve meals in its precincts. Can all of these sue Southwest because they have "separate and distinct interests different from those of the general public?" (Pet., p. 3) If they can, the Court may be sure that the CAB carriers will put them to it.

At this point in the chronology, by the early 1970's, the CAB carriers had provoked the Regional Airport Investigation in order to relieve themselves of an uneconomic dual airport operation; the CAB obliged by stimulating the Cities to designate a single airport for interstate air service; the Cities resolved their civic differences by electing to construct DFW at Grapevine; each CAB air carrier voluntarily agreed to transfer its "Certificated Air Carrier Services" to DFW and to become a "partner" of the Cities by

paying any deficit at the new airport and receiving the benefit of any surplus; and, since all concerned were receiving just the economic benefits and cooperation they wanted from their partnership, there was complete harmony until Southwest began operations and the Cities and Airport Board, at the behest of their CAB partners, attempted to coerce it into the partnership through the instrumentality of the 1968 Ordinance.

Neither Southwest nor the TAC was ever consulted concerning DFW. It was either go along or be smashed. Southwest refused to sign a Letter Agreement and applied to the Airport Board for an exemption from, or waiver under, the 1968 Ordinance. The response was a lawsuit filed in the Northern District of Texas by Dallas, Fort Worth and the Airport Board. The TAC, representing the State of Texas and represented by the Attorney General of Texas, voluntarily intervened in the case, adopting the contentions of Southwest Airlines. Thus, both Texas sides to the dispute over the "internal regulatory systems" of Texas—the Cities and Airport Board, on the one hand, and the State of Texas, on the other—voluntarily submitted their conflict to the federal court, rendering nugatory any questions of "equity, comity and federalism."

Southwest filed numerous pretrial motions in the case, including one to hold it in abeyance for the want of indispensable or necessary parties; *viz.*, the CAB air carriers serving the Dallas-Fort Worth area. Southwest was concerned that it might, for perhaps the twentieth time, be faced with multiplicitous litigation over the same issue from its friendly competitors. The denial of its motion was a guarantee that it would not and that a favorable judgment would protect it against continuation of their predatory tactics.

The trial itself extended over three weeks, in the spring of 1973, and the truncated Appendix filed with the Circuit Court on appeal alone comprises 5,696 pages in seventeen volumes. The trial proceeding were observed throughout by representatives of the CAB carriers. The fact that the plaintiffs were also acting as agents of the CAB air carriers in bringing the lawsuit and in vigorously presenting this point of view is sharply brought home by Dallas' answer to Southwest's interrogatories nos. 16 and 17, which together asked in what respect, if any, Southwest's remaining at Love would, as alleged, impair plaintiff's ability to "manage, control and discharge the bonded indebtedness of the Dallas-Fort Worth Regional Airport?" The Cities noted that, among other considerations affecting their management of the joint municipal enterprise:

> ". . . Loss of access to numbers of emplaining passengers of this magnitude to *air carriers* operating out of the Dallas-Fort Worth Regional Airport over the same intrastate routes, and the loss of the supplemental revenues anticipated from the use by these passengers of Dallas-Fort Worth Regional Airport parking facilities and other concessions, could well jeopardize the ability of *air carriers* operating at the Dallas-Fort Worth Regional Airport to pay the contracted rentals, fees and charges, and such competitive operation of airports contrary to the contracts and ordinances of the Cities of Dallas and Fort Worth would impose insurmountable burdens upon *such carriers.* (emphasis added) (R. 1803-06)

The District Court rendered a most comprehensive and analytical opinion in favor of the TAC and Southwest Airlines on numerous grounds, both federal and state in nature, which considered all of the arguments advanced in support of the Concurrent Bond Ordinance, including loss of revenue to the CAB carriers. 371 F.Supp. 1015 (Pet. App. ld et seq.). In this

regard, the quotation from Judge Taylor's opinion appearing on page 14 of the Petition is seized completely out of context. There, the Court was refuting the obviously contrived and erroneous contention by the plaintiffs that Southwest's remaining at Love Field would visit financial horror upon the Airport Board, as such, and, consequently, upon the citizens of Dallas and Fort Worth. Judge Taylor's actual holding on the matter of alleged financial detriment appears on page 16d of petitioners' Appendix:

> Although not pleaded by Plaintiffs, this Court is not indifferent to the financial needs of the Regional Airport. However, the evidence which Plaintiffs have presented on this point is at best inconclusive, and its relevance to the fundamental legal issues in this case has never been explained. Financial necessity can neither legitimize an unjust discrimination nor augment the basic power of municipalities as granted to them by the State. Plaintiffs have wholly failed to establish that Southwest Airlines is required by law to remove its operations to the Regional Airport upon its opening . . .

Plaintiffs appealed the District Court decision to the Fifth Circuit Court of Appeals, and Delta, American, Continental and TI filed amicus curiae briefs on plaintiffs' behalf. The briefs filed by the CAB carriers did not raise one issue that had not been raised by the plaintiffs, both in the federal District Court and in their brief on appeal. Nor did the carriers' briefs treat any of the issues in a manner different from the plaintiffs. Most notably, neither Delta, American, Continental nor TI claimed in their briefs that it was improper for the federal District Court to decide state law or that it should have abstained from doing so, which was their principal contention, and afterthought, before the Fifth Circuit in this case. 546 F.2d at 90-93 (Pet. App. 9a-16a).

In the meantime, back in Dallas, other litigation was ripening that the petitioners' brief, on page 7, describes as "not presently relevant." Unfortunately for petitioners, however, such litigation is dramatically and damagingly relevant to their position in this case.

Southwest and the TAC had requested an injunction prohibiting plaintiffs from interfering with Southwest's right to use Love Field. Judge Taylor did not grant the injunction, expressing himself as confident "that Plaintiffs will abide by [the Court's] ruling in this case and not attempt to interfere with or burden Southwest's right to use Love Field . . ." 371 F.Supp. at 1035 (Pet. App. 34d).

While the Fifth Circuit appeal was pending, but after oral argument thereof, Ordinance No. 14,505 was introduced before the Dallas City Council. This Ordinance penalized Southwest up to $200 for each landing and takeoff at Love Field, for a possible maximum fine of $6,000 per day. Several fiery Council meetings followed at which Southwest denounced the Council for its perfidy; informed the Council that it was deliberately flouting the plain language of Judge Taylor's judgment; and requested the Council to obtain an outside legal opinion. However, the City Attorney not only gave the Council his opinion that Ordinance 14,505 would not violate Judge Taylor's order, but also suggested that the Fifth Circuit had requested passage of the Ordinance. It was passed.

Southwest immediately obtained a temporary restraining order against enforcement of Ordinance No. 14,505, at a hearing wherein Judge Taylor denounced the City Council for its willful and contumacious disregard of his judgment. American and Delta Airlines intervened in the injunction suit on behalf of the City of Dallas; filed extensive briefs in support of the City;

conducted the oral argument to the virtual exclusion of the City; and were parties at the time that a permanent injunction was entered against enforcement of Ordinance No. 14,505.[2]

In the meantime, the Fifth Circuit panel, consisting of Judge Gee, a Texas lawyer from Austin, Texas; Judge (now Attorney General) Bell from Atlanta, Georgia; and Judge Aldrich, Senior Circuit Judge of the First Circuit, sitting by designation, unanimously affirmed the District Court decision in *Southwest I*, after deciding that Texas law was clear and that the TAC, and not the City of Dallas, had the right to determine whether or not Southwest could serve Love Field, so long as it remained open as an airport. To that end, the Fifth Circuit affirmed the trial court's holding that the 1968 Ordinance could not be enforced to exclude Southwest Airlines from Love Field. Judge Gee's opinion is set forth beginning at page 1c of petitioners' Appendix, and anyone who thinks that Texas law is unclear on this subject should reread it. The Texas Constitution and statutes alone ordain the result reached by the Fifth Circuit, excluding the added support of Texas cases and opinions of the Texas Attorney General. The constitutional and statutory language is plain and incontrovertible.

Next, the plaintiffs petitioned this Court for Certiorari in No. 74-324. They hired Erwin N. Griswold, former Dean of the Harvard Law School and Solicitor General of the United States, of the law firm of Reavis, Pogue, Neal & Rose, to represent them. Mr. Pogue is a former General Counsel and Chairman of the CAB, and the law firm formerly represented Eastern

[2] Southwest's suggestion that traditional principles of res judicata would not prevent the CAB carriers from litigating the validity of the ordinance, to which petitioners make reference, occurred in the course of a motion for summary judgment on the validity of Ordinance No. 14,505, since repealed by the City of Dallas.

Airlines; represented Pan American World Airways at the time of the filing of the Petition; and frequently jointly represents the major trunk carriers before the CAB. Plaintiffs also hired Mr. Charles S. Rhyne of the Washington law firm of Rhyne & Rhyne to represent them. And the CAB carriers got the Air Transport Association of America, representing all CAB certificated carriers, to file an amicus curiae brief on plaintiffs' behalf. Again, no new issues, or new thoughts on old issues, were presented, but certainly the plaintiffs could not be accused of being either niggardly or negligent in representing themselves and their CAB air carrier partners. Certiorari was denied.

Meanwhile, back again in Dallas, Texas, the CAB air carriers and the Cities, for public consumption, had filed damage claims against one another concerning their respective rights and obligations arising out of the DFW-Love Field conflict. They were, at one point, consolidated with the Southwest Airlines' injunction case directed at Ordinance No. 14,505, but the latter was subsequently severed from the consolidation.

Shortly after this Court denied Certiorari in Cause No. 74-324, in December, 1974, the air carriers and the Cities signed agreements voluntarily dismissing the federal case between them and trekked to the Austin State District Court, where, as heretofore described, the CAB carriers had previously achieved such spectacular success against Southwest that the Texas Supreme Court was compelled to issue a writ of prohibition against one of its trial judges. Since the dismissal, no more has been heard about withholding payment of landing fees at DFW or damage claims as between the Cities and the CAB air carriers.

In the Austin proceeding, a part of which was enjoined by the Court below, forming the basis for this Petition, the Cities,

with a certiorari denied final judgment against them, obviously could not do much affirmatively against Southwest. They had already performed their part, in any event, by agreeing to dismissal of the federal court suit with the CAB carriers. Everyone else ganged up against Southwest to throw it out of Love Field, citing the 1968 Ordinance as authority for this expulsion. Southwest did not "fully participate" in this case, as alleged on page 7 of the Petition. Instead, as permitted under Texas law, Southwest filed its pleas in abatement objecting to religitation of matters determined in *Southwest I,* and then set its pleas for hearing and briefed and argued them orally to the State district court, which rejected them. It was during this hearing that Continental's attorney, who also represents TI from time to time, or vice versa, informed the State district court judge that:

> Mr. Kelleher in his brief and to some extent in his argument talks about that this is an effort to undermine the federal court decision. That is not really an accurate characterization, Your Honor. This is a frontal attack on it. The word undermine implies something covert about it. We come in with flags flying. 396 F.Supp. at 683 (Pet. App.9b).

Having fully established on the record the ground rules of the game, Southwest applied to the federal court for an injunction prohibiting the CAB carriers from relitigating in state court the enforceability of the 1968 Ordinance against Southwest. Again, the State of Texas intervened on Southwest's behalf. A temporary restraining order and then a preliminary injunction were entered. The CAB carriers appealed the entry of the preliminary injunction to the Fifth Circuit, which resulted in the unanimous opinion written by Judge Wisdom and beginning on

page 1a of petitioners' Appendix. This Petition for a Writ of Certiorari arises from that decision.

REASONS FOR DENYING THE WRIT

In the decision below the Fifth Circuit, passing on the propriety of the District Court's grant of a preliminary injunction, violated neither the strictures of due process nor the restraints of comity. Rather, a unanimous panel, in a detailed opinion by Judge Wisdom, applied recognized concepts of representation to the particular facts of this case in affirming the order of injunctive relief. By so doing the Court of Appeals preserved that harmony between the federal and state sovereigns which is the object of the principle of comity and the goal of our federalism.

The Court of Appeals held that the petitioners here were bound by a prior judgment entered in a cause to which they were not formal parties, by the reasoned extension to the peculiar situation of this action of well-settled standards on the preclusive effect of judgments. The Court further held that an injunction against pending state court proceedings was permissible under the Anti-Injunction Act, 28 U.S.C. §2283, and the teachings of comity, on the basis of a correct reading of the prior abstention decisions of this Court. The opinion below represents the unexceptional application of prior decisions to a unique set of facts. Because the questions posed here were correctly decided below and because the unusual facts of this case make it an inappropriate vehicle for a general pronouncement from this Court on either res judicata or principles of comity, a writ should not issue to review this case.

1.Preclusion

Inherent in the principle, acknowledged by petitioners, that due process will, at some point, permit the operation of an earlier judgment as an estoppel on one not a party to the prior proceeding, is a recognition of the fact that the nature of the previous litgant, the identity of legal claims advanced, the similarity of relief sought, and the vigor of the earlier prosecution, may, in certain combinations, justify or require a court in the interests of sound judicial administration and fairness to the originally successful litigant, to hold that parties absent from the first action are nevertheless bound by its judgment. *Hansberry v. Lee,* 311 U.S. 32, 41-42 (1940). Federal and state courts have historically referred to this latter circumstance as a relationship of "privity" between the original and subsequent parties, and have precluded suits by parties and their "privies" to relitigate matters determined in a prior judgment. *Blonder-Tongue Labs. v. University Foundation,* 402 U.S. 313, 320 (1971).

The opinion of Judge Wisdom has noted, and, petitioners concede, "correctly recognized,"[3] that privity "denotes a legal conclusion rather than a judgmental process." 546 F.2d at 95 (Pet. App. 19a). And the modern trend among courts and commentators, of which the decision below and the *Restatement*[4] drafts are an example, has been away from an attempt to fit the circumstances of a particular case into certain pre-ordained categories of privity relationships, and toward an individual analysis of the facts of each situation. The

[3] *Petition,* p. 10.

[4] *Restatement Second of Judgments,* Tentative Drafts No. 1 (1973), No. 2 (1975), N0. 3 (1976), and No. 4 (1977).

Restatement sections, comments and illustrations cited in the Fifth Circuit's opinion and the petition, are an effort, within the *Restatement's* necessarily categorized framework, to allow for the application of an estoppel in a second proceeding, despite the absence of a complete identity of parties, where the preclusion of further litigtion would serve the interests of stability and certainty of decisions, conservation of judicial resources, and the avoidance of harassing suits and conflicting judgments, without "compromising fairness"[5] to the would-be plaintiff in the particular case.

The federal courts[6] have for some time recognized that the factors calling for the preclusion of those not parties to an action are particularly likely to occur when a governmental body litigates the validity of its own statute or regulatory ordinance as applied to a particular enterprise. In such an instance, a judgment holding the statute unenforceable as to that party has been found to bind all who seek a subsequent enforcement of the same ordinance against the same party. *Berman v. Denver Tramway Corp.,* 197 F.2d 946 (10th Cir. 1952).[7] *See In Re Engelhard & Sons Company,* 231 U.S. 646

[5] *Blonder-Tongue Labs. v. University Foundation,* 402 U.S. at 328 (1971).

[6] The Court of Appeals held that the preclusive effect of the federal judgment in *SouthwestI* must be determined as a matter of federal law. 546 F.2d at 94 (Pet. App. 17a). Petitioners do not dispute or seek review of this holding, rather, they describe it as "surely right." Petition, p. 9.

[7] The principle of preclusion by prior government representation is recognized in state law as well, including the law of Texas. As the Court of Appeals noted in the opinion below:

> Several states have adopted similar positions, including Texas, where citizens could not sue to prevent a railroad from moving its facilities once their city had already lost an identical suit. *See Hovey v. Shepherd,* 1912, 105 Tex. 237, 147 S.W. 224, *cited with approval, City of Palestine v. City of Houston,* Tex.Civ.App. 1924, 262 S.W. 215, holding that a city could properly represent its citizens' interests in litigation over the movement of railroad facilities.

546 F.2d at 98, n. 53. (Pet. App. 26a).

(1914); *Smith v. Illinois Bell Telephone Company*, 270 U.S. 587 (1926).

Writing of this Court's decision in *Re Engelhard & Sons Co., supra,* the opinion below noted that:

> [*Engelhard*] was a case in which the Supreme Court refused to allow a private party to intervene in a suit between a city and the local telephone company. The Court assumed that the city would vigorously pursue the action and would therefore adequately represent both the public and the subscribers to phone service. Although this case does not identify the type of relationship necessary for res judicata, it does deny a day in court both to members of the public and to private persons with pecuniary interests in the dispute. [8]

Faced in this case with the task of identifying the nature of the relationship between parties and causes of action "necessary for res judicata," the Court recognized three salient characteristics, present here and in earlier suits granting preclusive effect to prior government litigation.

> First, the CAB carriers do not claim a breach of legal duty by Southwest, apart from the alleged violation of the general duty to obey valid ordinances. Second, the carriers request the same remedy denied the City of Dallas, namely the enforcement of the phase-out provision of the ordinance to exclude Southwest from Love Field. Third, the ordinance does not establish a statutory scheme looking toward private enforcement of its requirements.[9]

[8] 546 F.2d at 98, n. 52 (Pet. App. 25a).

[9] 546 F.2d at 100 (Pet. App. 30a).

The Court of Appeals held that a prior unsuccessful judicial attempt by a governmental unit to enforce its own ordinance operated to preclude a subsequent suit by private parties where 1) the second suit did not rest on a personal legal right or claim peculiar to the private litigant; and 2) the identity of interest between the governmental litigant and the private party was exact, in that both sought the imposition of the same obligation arising from the same source on the same third party; and 3) the ordinance or statute in question did not itself establish a private scheme of enforcement independent of government action. With these factors isolated, it becomes apparent that the decisions of this Court alleged by petitioners to be in conflict with the holding of the Court of Appeals deal with situations quite different from that involved here.

In *Kersh Lake Drainage District v. Johnson,* 309 U.S. 485 (1940), cited by petitioners as "instructive" on the questions presented in this case, this Court held that in a suit brought by a local drainage district to collect taxes ordered assessed to pay the claims of bondholders, the individual landowners were not estopped from asserting their "personal and peculiar" claims of having been released from all such liability, despite a prior federal court adjudication of the district's collective liability to the purchasers of its bonds. The Court found that the district "did represent all landowners in unsuccessfully defending the certificate holders' suit for an adjudication of the total collective corporate obligation of the District as an entity," 309 U.S. at 494; but that the resolution of the general question could not dispose of the landowners' personal claims arising from an

independent legal basis. As this Court observed,

> Certainly, the decree in the injunction suit in the federal court would not prevent an individual property owner from subsequently interposing the defense that his property was not in fact included within the Drainage District. Cognate personal defenses, such as the one that a landowners' proportionate drainage tax liability has been declared by the judgment of a competent tribunal to have been "ascertained and paid", were not foreclosed by the Federal District Court's judgments.[10]

Far from undermining the decision below, *Kersh Lake* supports the Fifth Circuit's conclusion; and petitioners' contrary argument arises from a basic error in paraphrasing the decision. The Court did not find that the district's litigation failed to preclude the landowners because of the latter's personal and peculiar *financial interest* in the outcome of the litigation, as the petition clearly suggests. Rather the Court permitted the landowners to raise those legal claims which were peculiar to them, which did not derive from, and indeed had been won in suit against, the district. In *Kersh Lake* the subsequent private litigants sought to obtain relief on the basis of a legal duty owed to them apart from the general rights and obligations deriving from participation in the drainage district. To that extent alone were they permitted to assert their claims despite the district's earlier unsuccessful litigation. As to all questions concerning the general powers, rights, and duties of the district, the Court was clear in holding, and the petitioners here concede, that the district's federal court litigation bound all of the absent landowners.

So also in this case, the Court of Appeals held that as to the question of the rights, duties and obligations of the City of

[10] 309 U.S. at 494-95. [Footnotes omitted.]

Dallas, the petitioners are bound by the judgment in *Southwest I.* And, unlike the landowners in *Kersh Lake,* petitioners have advanced in their state court suit, no "personal and peculiar" legal basis for the exclusion of Southwest Airlines from Love Field; petitioners "do not claim a breach of legal duty by Southwest, apart from the alleged violation of the general duty to obey valid ordinances."[11] Indeed, to the extent petitioners seek the exclusion of Southwest Airlines on the basis of their "personal and peculiar" legal claims—claims that do not involve the enforcement of the 1968 Regional Airport Concurrent Bond Ordinance—they are not prohibited from doing so by the injunction affirmed below. That order, a copy of which appears as Exhibit A to this brief, is narrowly drawn to enjoin only litigation concerning "the validity, effect, or enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas insofar as it may affect the right of plaintiff Southwest Airlines Co. to the continued use of and access to Love Field . . . " [Appendix at A-5].

A similar confusion concerning the use of the term "interest" accounts for petitioners' argument that the opinion in *Trbovich v. United Mine Workers of America,* 404 U.S. 528 (1972), bears on the decision here. *Trbovich* involved a petition by an individual union member to intervene in a suit brought by the Secretary of Labor to set aside an election of union officers. In granting the petition, at least insofar as the individual member raised only those claims previously asserted by the Secretary, the Court found that the Secretary's dual obligation to protect the public's interest in fair union elections and the complaining union member's interest in his particular situation "may not always dictate precisely the same approach to the

[11] 546 F.2d at 100 (Pet. App. 30a).

conduct of the litigation,"[12] 404 U.S. at 539, and, consequently, intervention by the union member was appropriate to protect his potentially divergent interest in the outcome of the litigation. In *Trbovich* the Court was speaking to a variance of interests that went beyond the question of a personal stake in the litigation and raised the spectre of varying interests in the remedy to be obtained.

In contrast, the court below based its holding of preclusion in part on the fact that the position taken and the remedy sought by the City of Dallas in *Southwest I*—that the 1968 Ordinance operated to exclude Southwest Airlines from Love Field—coincided precisely with the petitioners' attempt to enforce the ordinance in the state court in order to expel Southwest Airlines from Love Field.[13]

Contrary to petitioners' implication, *Trbovich* does not argue for the necessity of separate suits whenever the litigants' financial stake in the enforcement of the law differs from that of the

[12] Similarly in *Patterson v. Burns*, 327 F.Supp. 745 (D. Haw. 1971), the district court permitted a private citizen to challenge an appointment to fill a legislative vacancy despite a prior attempt by the lieutenant governor, as the chief election official, to block the same appointment in the courts, because the lieutenant governor's paramount interest in upholding his own interpretation of the state election code had prevented him from advancing federal constitutional agruments against the contemplated procedure, which were available to the individual litigants. His primary interest in an interpretation of the Code itself had led to a strategy that deprived the private citizens of representation in the original suit. Further, as in *Kersh Lake*, the subsequent litigants sought to raise their "personal and peculiar" constitutional claims, which existed independent of the State of Hawaii.

[13] Moreover, as the opinior of the Court of Appeals notes, the due process question at issue here, unlike the intervention matter in *Trbovich*, is decided on the basis of the positions taken and the outcomes actually sought in the conduct of the original litigation. The courts below were not required, as was this Court in *Trbovich*, to speculate on a possible divergence between the positions of the governmental and private litigants, since they could and did examine in detail the *actual* conduct of the trial in *Southwest I* and could and did satisfy themselves as to both the vigor of the prosecution and the identity of legal interest. 546 F.2d at 102, n. 61 (Pet. App. 34a).

government representative—for so to argue would reject the concept of governmental representation in its entirety, which this Court has not sanctioned. Rather *Trbovich* speaks only to those situations, unlike the present case, in which different reasons for desiring enforcement may affect the kind of enforcement desired.[14]

The exhaustive Court of Appeals opinion demonstrates that the panel of the Fifth Circuit was fully aware of the due process implications of the decision which it rendered and was informed by this Court's basic pronouncement in *Hansberry v. Lee*, 311 U.S. 32 (1940). The Court of Appeals faced the precise argument advanced by petitioners here—that no matter how similar the legal interests and positions of the original governmental and subsequent private litigants might be, a private party with a particular financial stake in the success of the government's enforcement action cannot be precluded by a judgment against the government. This is not the teaching of *Kersh Lake* or *Trbovich*. And, as Judge Wisdom has forcefully noted, it is certainly not the holding of *Hansberry*.

> After adopting a case by case approach to examining the procedural protection, the Court held that preclusion on the facts of *Hansberry* violated due process. Not only were the defendants not parties or common law privies to the

[14] In this regard a comparison of the decisions in *Engelhard* and *Trbovich* is most instructive. In both cases this Court faced requests by private parties to intervene in suits brought by agencies of government. In *Engelhard* where, as in this case, the private parties sought merely to second the government's attempt to obtain enforcement of its own ordinance and no conflict existed in the remedies being sought, the Court found the government representation adequate, despite the peculiar financial interests of the erstwhile private litigants. In *Trbovich* the scales tipped toward intervention not because of the existence of individuals with a personal interest in the outcome, since that had been true in *Engelhard* as well, but rather the Court permitted the intervention of one who potentially sought an enforcement of the law different from that being pressed for by the government.

first action, but also their legal interests were not represented by the property owners who led the first class. The property owners in the first suit attempted to uphold the covenant while the defendants tried to invalidate it. Consequently, the class represented legal interests in direct opposition to the position of the defendants.

* * * *

The situation presented in *Hansberry,* therefore, is not presented here. The appellants assert the contrary by arguing that the interests of the cities in *Southwest I* differs from the pecuniary interests of the carriers. This argument misreads *Hansberry*, a case that looks to the congruence of the legal interests of the parties and non-parties not to their financial stake in the litigation. The pecuniary interest of the airlines is legally immaterial to the judgment of *Southwest I* as affirmed by this Court.[15] The judgment addresses the validity under Texas law of the 1968 ordinance, and on that issue no conflict exists between the cities and the CAB carriers.

546 F.2d at 101-02 (Pet. App. 33a-34a).

While this case might present a diverting academic squabble over whether a peculiar set of facts falls within a given subsection or comment of a particular tentative draft of the *Restatement,* it conflicts with neither the holding nor the spirit of this Court's earlier decisions on representation in general and preclusion by prior government litigation in particular. What has happened here is that the City of Dallas chose to litigate the validity of its ordinance in the federal court. The city lost that

[15] The legal irrelevance of the airlines' financial interest to the question of the power of the City of Dallas under federal and state law was a matter considered and noted by the district court in the original *Southwest* litigation. That decision did not ignore the CAB carriers' financial stake in the DFW airport, as the Petition suggests, but rather found, as did the Fifth Circuit, that it was legally immaterial to the validity of the 1968 Concurrent Bond Ordinance:

> Financial necessity can neither legitimize an unjust discrimination nor augment the basic power of municipalities as granted to them by the State. *City of Dallas, Texas v. Southwest Airlines Co.*, 371 F.Supp. 1015, 1026 (Pet. App. 16d).

suit when the federal district court declared that it could not bar Southwest Airlines from using Love Field, and that the ordinance, insofar as it would have that result, was invalid. That ordinance neither contemplated nor provided for private enforcement of its provisions.

Now, private parties have repaired to a state court and are attempting to convice that court to allow them to enforce that invalid ordinance against the very party the City was forbidden and enjoined by the federal court from enforcing the ordinance against.

It would be an affront to the dignity of the federal judicial system, and a perversion of all principles of comity and judicial efficiency to permit a state court to relitigate the enforceability of that ordinance against Southwest Airlines. Yet that is precisely what that part of the state suit which was enjoined by the court below seeks to do.

The ordinance has been once judicially declared to be invalid in a suit brought by the city. It therefore cannot be enforced by Dallas nor by anyone unless the federal court's declaration of invalidity against the City of Dallas is somehow avoided. This can only be done by flagrantly and with conscious indifference to the principles of both finality of judgments, and the federal court's jurisdictional right to hear questions of state law, allowing a state court to relitigate the very matter which the federal district court in *Southwest I* decided, the Fifth Circuit affirmed, and this Court declined to hear.

Thus, no principles of due process are violated by the lower court's injunction. The City is the only party with the power to enforce this ordinance. The City had its day in court in a forum

of its own choosing. It decisively lost. The ordinance is dead and no private party should be allowed to resurrect it through the guise of a state court suit asserting private rights which simply do not exist under the now defunct ordinance. Private parties cannot extract power from a municipal ordinance when the municipality which passed that ordinance has been judicially precluded from enforcing it. Since the petitioners have no other basis than the ordinance for evicting Southwest Airlines from Love Field, they can obtain no such relief in the state court suit unless the judgment in *Southwest I* is either ignored or violated. Petitioners' due process arguments do not, therefore, support review here.

2. Federal - State Relations

Petitioners advance their second argument for review of the decision below in this Court under the standard of "equity, comity and federalism." And though the precise point of this contention is never made clear, it appears to be an amalgam of two distinct ideas—both incorrect.

Petitioners first urge that the district court's original decision in *Southwest I,* affirmed by the Fifth Circuit in 1974, a case in which this Court has denied a petition for certiorari, was decided by the lower federal courts in contravention of prior Supreme Court abstention decisions. In *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 814-817 (1976), this Court had occasion to canvass the history of decisions requiring or sanctioning abstention. The Court there noted that "[o]ur decisions have confined the circumstances appropriate for abstention to three general categories." Two of those three circumstances—cases presenting federal constitutional issues which might be mooted or recast by a

decision of state law and criminal or closely related prosecutions undertaken in good faith—were not even arguably presented in *Southwest I;* and petitioners have based their entire abstention position on this Court's second category: cases "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Id.* at 814.

However, petitioners face two problems in attempting to fit the initial *Southwest* litigation into such a category. Most obviously, the original suit was not a proper candidate for abstention because the issues of state law presented were not difficult ones. Judge Wisdom's opinion considers at some length[16] the constitutional, statutory and case law of Texas upon which the district court and a prior panel of the Court of Appeals relied in determining that, as between the Texas Aeronautics Commission and the City of Dallas, the question of which controlled intrastate airline access to Love Field had a "simple answer."[17] In so holding the original Fifth Circuit panel was guided by the plain language of Texas constitutional and statutory provisions and the specific and recent direction of the Texas Supreme Court that "[t]he decision as to where the public interest lies and what air service is best for Texas must be made by the Texas Aeronautics Commission."[18] Additionally, as petitioners apparently overlook, the Court of Appeals also relied on the guidance of previous Texas Supreme Court decisions denying to home rule cities the power to affect intrastate travel beyond their boundaries by closing off public trans-

[16] 546 F.2d at 90-93 (Pet. App. 9a-16a).

[17] *City of Dallas v. Southwest Airlines,* 494 F.2d 773, 776 (5th Cir. 1974). (Pet. App. 4c).

[18] *Texas Aeronautics Commission v. Braniff Airways, Inc.,* 454 S.W.2d 199, 201 (Tex. Sup. 1970), *cert. denied* 400 U.S. 943.

portation thoroughfares to public transport[19] and the opinion of the Texas Attorney General confirming the primacy of the Texas Aeronautics Commission in regulation of "for-hire air transportation" within a city's limits.[20]

Secondly, this case does not involve the kind of unwarranted and frequently unsettling federal intrusion into state regulatory schemes which *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and the other decisions in the second category of abstention were designed to prevent. For not only is the issue of state law well settled and uncomplicated, but the very controversy itself was brought to the federal court by three creatures of the State of Texas, the Cities of Dallas and Fort Worth and their joint Board, and voluntarily joined by the Texas Aeronautics Commission, a state agency—all invoking the federal question jurisdiction of the district court in an effort to resolve their controversy.[21] Rather than disrupting the state administrative process, the evil which *Burford* and its progeny were developed to guard against, *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959), the original Southwest decision came, as

[19] *City of Arlington v. Lillard*, 294 S.W. 829 (Tex. Sup. 1927); *City of Fort Worth v. Lillard*, 294 S.W. 831 (Tex. Sup. 1927).

[20] Op. Att'y Gen'l of Texas, September 2, 1969. Judge Gee's opinion affirming the grant of declaratory relief in *Southwest I* notes that the Attorney General of Texas has ruled that the TAC's powers "extend to routes entirely *within* one city.... Here, little but designating points of take-off and landing is involved." 494 F.2d at 776, n. 7. (Pet. App. 6c).

The Court has in past abstention decisions found the opinions of state attorneys general to be important factors in clarifying, or obscuring, questions of state law. *See, e.g., Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 30 (1959). Here, in contrast to *Thibodaux*, the Attorney General's opinion confirms and supports the language of the relevant statutes and no conflict of authority exists.

[21] This Court has previously indicated that, where the issues of state law are presented in a case brought under federal question jurisdiction, the abstention threshhold might well be higher than in mere diversity cases. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 815, n. 21 (1976); *Burford v. Sun Oil Co.*, 319 U.S. 315, 318, n. 5.

the Court of Appeals noted below, only after "state agencies themselves requested the federal decision," 546 F.2d at 93 (Pet. App. 15a). In this context Judge Wisdom observed that:

> . . . it cannot be said that a federal court disrupts harmonious relations with a state by responding to a request by the bickering state agencies to resolve their dispute.[22]

Petitioners move from the argument that abstention was required in *Southwest I* to the proposition that, given its dubious beginnings, the decision is particularly unworthy of the protection of an injunction against relitigation. However, given the absence of any valid ground for abstention in the original proceeding and the correctness of holding the petitioners bound in their enforcement suit by the city's previous unsuccessful effort, the propriety of the injunction against relitigation must be judged as it would be in any other case in which prior litigation has rested on state law grounds. As the Petition concedes, to deny such decisions the protection of an injunction against relitigation would undermine the very rationale behind the diversity and pendent jurisdictions of the federal courts; for the Petition itself recognizes that "[s]o long as diversity jurisdiction remains, it is workable only if a federal court is deemed competent to determine state law for purposes of a particular case."[23]

Nor does the injunction entered below extend the impact of the federal judgment beyond the boundaries of the "particular case." Contrary to petitioners' argument both to this Court and below that whole areas of state law have been removed from the jurisdiction of Texas state courts, the injunction, as the Court of

[22] 546 F.2d at 93 (Pet. App. 16a)

[23] Petition, p. 19.

Appeals repeatedly noted, will have no such effect:

> The district court injunction applies, quite narrowly, to relitigation of the Love Field controversy only as it affects Southwest. The CAB airlines can continue to litigate their rights to serve Love Field even if the injunction is affirmed. Because the CAB rather than the TAC regulates them, however, they will not be able to present a TAC-City of Dallas clash directly to the Texas courts. Nevertheless, another set of facts could present to the Texas courts the question of the relative powers of the TAC and local governments to regulate airports. The district court injunction would not reach such a case as long as the state decision did not attempt to contravene Southwest's rights under the 1973 judgment.
>
> * * * *
>
> Preventing this affront to the federal judgment will not preclude Texas courts from addressing the legal issues that underlie this dispute. Under *Pullman* and its progeny, the resolution of legal issues in *Southwest I* does not bind the Texas judiciary on those questions of law. In this case, we hold only that the CAB carriers cannot assail a federal judgment by relitigation in state courts. If the Texas courts or legislature should establish legal rules incongruous with the legal principles that controlled *Southwest I,* then relief from the federal judgment may be justified under Rule 60(b) of the Federal Rules of Civil Procedure. *See Glenn v. Field Packing Co.,* 1933, 290 U.S. 177, 54 S.Ct. 138, 78 L.Ed. 252; *Oliver v. Monsanto Co.,* S.D.Tex. 1972, 56 F.R.D. 370, *aff'd.,* 5 Cir. 1973, 487 F.2d 514; 7 Moore's Federal Practice ¶60.26[4] (1971); C. Wright and A. Miller, 11 Federal Practice and Procedure §2283 (1973). Of course, we do not reach the 60(b) question today. But we do suggest that by allowing the federal courts to determine the continuing effectiveness of their judgments, the Rule provides an approach more consistent with the above policies of federalism than the "frontal attack" launched by the CAB carriers in *Austin.* [24]

[24] 546 F.2d at 91, n. 19 and 93, n. 29. (Pet. App. 10a and 16a).

The district court that has lived with this controversy, in all of its permutations, since 1972, found that respondent faced the harassing and burdensome relitigation of matters clearly determined in an earlier suit brought and lost by a party legally entitled to represent the interests of the would-be plaintiffs in the instant case on the matters at issue here. On that basis the Court acted to prevent the injury to respondent and the disruption of federal-state relations inheent in a frontal attack on a federal judgment in state court. In this regard the situation here is most unlike *Lamb Enterprises, Inc. v. Kiroff,* 549 F.2d 1052 (6th Cir. 1977), in which the court declined to enter an injunction where it was doubtful that the original decision had touched the merits of the controversy and no indication of vexatious or harassing litigation existed. Indeed, far from violating either the letter of spirit of this Court's comity decisions, the order of the district court and the opinion of the Court of Appeals have simply preserved the integrity of a federal judgment on issues of state law in a particular case, while leaving the questions of state law open to any appropriate state adjudication in the future.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit correctly decided the relevant legal issues by application of existing precedent to a unique fact situation. The precise questions decided are unlikely to recur with any frequency and the decision below in no way prevents state court adjudication of the relevant issues of state law in subsequent proceedings between different parties.

For the reasons stated herein, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John L. Hauer, attorney for Respondent Southwest Airlines Co. and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of August, 1977, I served three (3) copies of the foregoing document, in a duly addressed envelope, with airmail postage prepaid, as required by Rule 33(1) of this Court, upon each of the following counsel: Charles Alan Wright, 2500 Red River Street, Austin, Texas 78705, attorney for Petitioners; and J. David Hughes, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, attorney for Respondent Texas Aeronautics Commission.

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John L. Hauer

In The United States District Court
For the Northern District of Texas
Dallas Division

Civil Action No. CA 3-75-0340-C

Southwest Airlines Co.,
Plaintiff,

and

The Texas Aeronautics Commission,
Plaintiff-Intervenor,

v.

Texas International Airlines, Inc.; Delta Air Lines, Inc.; American Airlines, Inc.; Braniff Airways, Inc.; Ozark Air Lines, Inc.; Frontier Airlines, Inc.; Continental Air Lines, Inc.; Eastern Air Lines, Inc.; City of Fort Worth, Texas; City of Dallas, Texas; and Dallas-Fort Worth Regional Airport Board,
Defendants.

June 5, 1975

ORDER GRANTING PRELIMINARY INJUNCTION

There came on to be heard, this third day of April, 1975, with notice to, and appearance by the defendants herein, the application of plaintiff Southwest Airlines Co. for a Preliminary Injunction pursuant to Count One of plaintiff's verified Complaint, and from the specific facts set forth in said Complaint, the evidence introduced at the hearing by plaintiff and defendents, the argument and briefs of counsel, and from judicial notice of this Court's own records, the Court finds that:

1. This Court has previously held in Cause No. CA 3-5927-C, entitled "The City of Dallas, Texas, et al vs. Southwest Airlines Co. and the Texas Aeronautics Commission," that the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas may not legally be applied to exclude Southwest

Airlines from Love Field; and it ordered that the City of Dallas "may not exclude Defendant Southwest Airlines from the use of Love Field, Dallas, Texas, and its airport facilities so long as Love Field remains open"; said order was entered as a part of the Final Judgment in said cause on May 11, 1973, after a trial which began on March 26, 1973; and said order and Final Judgment remain in full force and effect, having been affirmed by the United States Court of Appeals for the Fifth Circuit, with mandate issuing on September 3, 1974, and petition for writ of certiorari having been denied by the United States Supreme Court on December 16,1974; and

2. Due to the attempt by the City of Dallas, subsequent to said May 11, 1973, final declaratory judgment, to exclude Southwest Airlines from Love Field while Love Field remained open, a permanent injunction was entered on February 10, 1975, whereby the City of Dallas was enjoined from "directly or indirectly, acting to exclude Plaintiff Southwest Airlines Co. from the use of Love Field, Dallas, Texas, and its airport facilities, so long as Love Field remains open as an airport;" the judgment of this Court granting said injunctive relief is final and no appeal has been taken therefrom; and

3. On December 10, 1974, one of the defendants herein, Texas International Airlines, Inc., filed a suit in a state court in Austin, Texas, in the District Court of Travis County, 200th Judicial District, styled No. 227,349, "Texas International Airlines, Inc. vs. The Dallas-Ft. Worth Regional Airport Board, et al," in which all of the parties to this federal suit are likewise parties, which seeks to interfere with the advantages resulting to plaintiff from the May 11, 1973, judgment of this Court, and which seeks to exclude Southwest from

Love Field while Love Field remains open by relitigating against Southwest Airlines Co. matters which were litigated, determined and adjudicated by this Court in Cause No. CA 3-5927-C. Specifically, Defendants seek in the Austin suit to relitigate the validity and enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas as a means of excluding Southwest Airlines from Love Field. Various of the other parties in said court suit also seek, by means of cross-actions and counterclaims, to relitigate those same matters, which were previously litigated, determined and adjudicated by this Court in Cause No. CA 3-5927-C, and to thereby exclude Southwest Airlines Co. from Love Field while Love Field remains open, through enforcement against Southwest of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas; and

4. It appearing to the Court that the defendants herein, parties to the state court suit, seek to enforce the 1968 Concurrent Bond Ordinance against Southwest Airlines, despite the fact that the validity and enforceability of said ordinance against Southwest Airlines was previously adjudicated by this Court against the Cities of Dallas and Fort Worth and the Dallas/Fort Worth Regional Airport Board in Cause No. CA 3-5927-C; and

5. It Further appearing to the Court that the public and all of the Defendants herein are prohibited from relitigating the validity, effect or enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas insofar as said Ordinance may affect the right of the plaintiff Southwest Airlines Co. to continued use of and access to Love Field, so long as Love Field remains open, by the prior determinations of

this Court and of the United States Court of Appeals for the Fifth Circuit, in a suit brought by the Cities of Dallas and Fort Worth and the Regional Airport Board, that the Ordinance may not be enforced to exclude Southwest from Love Field, so long as Love Field remains open; and

6. It appearing that if said lawsuit in the District Court of Travis County, Texas, 200th Judicial District, is prosecuted to successful conclusion by Texas International Airlines, Inc., or by various of the other defendants by means of their cross-actions and counterclaims therein, or if plaintiff Southwest Airlines Co. is required to defend said lawsuit, Southwest will be deprived of the fruits and advantages of the May 11, 1973, order and judgment of this Court and will be irreparably injured by interference with its right of access to Love Field while Love Field remains open and will, regardless of the ultimate outcome of said state court suit, be subjected to multiplicitous and further vexatious litigation and its finances, customer and business relationships, and shareholder interests will also be adversely affected, and Southwest Airlines Co. will be damaged in an amount which cannot be determined with any reasonable exactitude; and

7. It appearing to the Court that if plaintiff's complaint herein were pending in this Court without interim injunctive relief, all of the defendants would rush to trial and judgment in the Austin suit and thereby force Southwest to relitigate the aforesaid matters, previously litigated, determined and adjudicated by this Court, the issuance of a Preliminary Injunction is needed to preserve the status quo of the parties which existed before the state court suit was filed. Plaintiff has no adequate remedy at law and the issuance of such Preliminary Injunction will cause defendants no harm.

IT IS, THEREFORE, ORDERED ADJUDGED and DECREED that plaintiff Southwest Airlines Co. is entitled to the Preliminary Injunction as herein granted, the same being within its allegations and prayer; and

IT IS ORDERED, ADJUDGED and DECREED that, pending a final determination on the merits of plaintiff's claim, the defendants Texas International Airlines, Inc., Delta Air Lines, Inc., American Airlines, Inc., Braniff Airways, Inc., Ozark Air Lines, Inc., Frontier Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., the City of Fort Worth, Texas, the City of Dallas, Texas, and the Dallas-Fort Worth Regional Airport Board are restrained and enjoined from litigating in Cause No. 227,349 in the District Court of Travis County, Texas, 200th Judicial District, or in any other court action, the validity, effect, or enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas insofar as it may affect the right of plaintiff Southwest Airlines Co. to the continued use of and access to Love Field, so long as Love Field remains open; provided that plaintiff shall, prior to the issuance of this Preliminary Injunction by the Clerk of this Court, file with the Clerk, a bond executed by it in the sum of $10,000.00, payable to defendants, with one or more good and sufficient sureties provided and conditioned as the law requires.

IT IS FURTHER ORDERED that this cause is set down for trial on the merits to be held before me on the 11th day of August, 1975, in the United States District Courtroom of Dallas, Texas.

ENTERED this 5th day of June, 1975.

/s/ W. M. Taylor

W. M. Taylor, Jr., Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1773

TEXAS INTERNATIONAL AIRLINES, INC.; DELTA AIR LINES, INC.; AMERICAN AIRLINES, INC.; FRONTIER AIRLINES, INC.; OZARK AIR LINES, INC.; EASTERN AIR LINES, INC.; AND CONTINENTAL AIR LINES, INC.,
Petitioners,

v.

SOUTHWEST AIRLINES CO. AND THE TEXAS AERONAUTICS COMMISSION,
Respondents.

BRIEF OF RESPONDENT, TEXAS AERONAUTICS COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF OF RESPONDENT, TEXAS AERONAUTICS COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the Texas Aeronautics Commission, respectfully prays that this Petition for Writ of Certiorari be denied. Policies of res judicata should serve to prevent the unending litigation of issues which have been previously decided according to settled principles of the applicable law. The opinion of the Fifth Circuit below, sustaining the injunction, correctly resolved the issues currently raised by Petitioners and should put a definitive end to the controversy.

QUESTIONS PRESENTED

1. Whether Petitioners' interests are sufficiently aligned with the governmental bodies in the prior litigation so that they are barred from attempting to enforce, in state court, an ordinance which was previously held invalid in federal court.

2. Whether abstention policies should have directed the federal courts to abstain from any decision making in the first Southwest controversy and whether the district court's granting of an injunction to stay proceedings in state court was consistent with the Anti-Injunction Statute's directive to effectuate the court's judgment.

STATEMENT OF THE CASE

The opinion of the Fifth Circuit in *Southwest Airlines Co. v. Texas International*, 546 F.2d 84 (1977), wherein the Texas Aeronautics Commission participated as intervenor-appellees, gives a clear and accurate statement of facts and issues involved in this litigation from beginning to end. The Texas Aeronautics Commission hereby adopts that statement of the case as its own.

REASONS FOR DENYING THE WRIT

I. IN GENERAL

The litigation presently before the Court is complicated and unique. The Fifth Circuit below recognized that "the federal judiciary has never faced the precise question posed by the instant facts." 546 F.2d at 98. In fact, Petitioners admit that "these exact facts may not be repeated" and that the facts are "peculiar." The Court should avoid cases which present fact situations that are unlikely to occur again. The

legal questions presented may be interesting in an academic sense. However, rules of law announced in an atypical case such as this may cause lower courts to unwittingly make "bad law" in the typical cases which provide the bulk of litigation in the federal courts. Furthermore, while the facts in the case are unique, the applicable law is not. The Fifth Circuit has decided the case in a way which is consistent with the prior decisions of this Court.

II. DUE PROCESS AND RES JUDICATA

The Fifth Circuit correctly held that the prior federal judgment concerning Southwest Airlines' right to use Love Field was res judicata, and that the injunction granted by the district court was necessary to protect the integrity of the previous judgment and did not violate the Petitioners' due process rights.

Petitioners attempt to persuade the Court that "this case, in its present posture, raises no issue about whether Southwest Airlines should fly from Love Field or DFW," and that the only issue before the Court is one of due process. It is obvious, however, that the Court cannot abstract certain elements of a case and view them in complete isolation. In the state court, Petitioners were seeking to enforce the provisions of a city ordinance which would exclude Southwest Airlines from using Love Field. The governmental entities which issued the ordinance, Dallas and Fort Worth, were the only parties who had the authority to enforce the ordinance. In the previous litigation the cities failed in their attempt to exclude Southwest from Love Field by ordinance. Petitioners here alleged no common law, statutory, constitutional, or other private remedy in the state court for the exclusion of Southwest from Love Field. Their only allegation was that the 1968 Bond Ordinance, previously held invalid, prevented Southwest from flying to Love Field. Since Petitioners have neither standing to enforce the ordinance or a private legal remedy for its violation, the previous judgment declaring the ordinance invalid

with respect to Southwest binds Petitioners. *See, e.g., Rodriquez v. East Texas Motor Freight,* 505 F.2d 40 (5th Cir. 1974), *vacated and remanded on other grounds,* _____U.S. _____, 97 S. Ct. 1891 (1977). Petitioners may argue that their pecuniary interest gives them standing to enforce the ordinance. However, their interest in its enforcement can be no greater than that of the promulgating bodies themselves, Dallas and Fort Worth. In fact, the more they urge their standing to enforce the ordinance, the more it appears that they are in privity with the cities and therefore bound by the previous judgment. Conversely, the more they argue that they are not in privity with the cities, the more it appears that they have no standing to enforce the ordinance.

The Fifth Circuit's analysis of §85(d), *Restatement of the Law Second–Judgments* (Tent. Dr. No. 2, 1975) supports its decision that res judicata binds petitioners. *See* 546 F.2d at 97–102. Under the *Restatement* analysis, a private party must show more than a special pecuniary interest when attempting to relitigate the breach of a public duty which has previously been litigated by a government body. The *Restatement* narrowly reserves the right to relitigate such issues to private plaintiffs who could recover under a scheme of remedies that "contemplate enforcement of private interests both by a public agency and the affected private parties." *Restatement of the Law Second-Judgments* §85 (Tent. Dr. No. 2, 1975) (Reporter's Note to Comment *d*). As previously stated, there was no statutory or other private remedy available to the Petitioners for private enforcement of the ordinance. The Fifth Circuit correctly adopted the *Restatement* approach "because it promotes the policies of res judicata in this factual setting. To allow relitigation by any private litigant with a pecuniary interest in the success of the new airport would open the door to recurrent, burdensome litigation. . . . To allow relitigation by all of these parties would surely defeat the res judicata policies identified above." 546 F.2d at 100.

Petitioners argue, however, that even if §85(d) of the *Restatement Second* precludes relitigation, §68.1(e)(i), provides an applicable exception. §68.1(e)(i) is not specific, but rather only vaguely refers to "potential adverse impact on . . . the interests [of Petitioners]." Petitioners also rely on Comment *h* which provides in equally vague terms that, "due consideration of the interest of persons not themselves before the court in the prior action may justify relitigation of an issue . . ." But Comment *h* follows this statement with only one example:

> "For example, in a class action, see §85, members of the class may be content to have a particular person represent them in connection with one claim, not knowing or having reason to know that an issue may be litigated in the action that is crucial to the determination of another, unrelated claim in which they have an interest."

This example, however, does not apply here. First, §68.1(e)(i) is inapplicable because the action was not a class action. Second, Petitioners make no claim that an issue decided in this case "is crucial to the determination of another unrelated claim in which they have an interest."

Petitioners claim that the federal courts denied them due process of law by preventing them from relitigating the issues in *Southwest I.* Anytime a non-party in a prior suit is barred by res judicata from bringing a subsequent suit, due process issues are raised. Nevertheless, due process of law is satisfied if the party seeking relitigation was "in privity" with a party to the prior suit or "virtually represented" by that party. Of course, "concurrent privity" and "virtual representation" are, as the Fifth Circuit below stated, "legal conclusions rather than a judgmental process." 546 F.2d at 95. Prior to the application of these conclusory terms there must be an examination of the relationship between the parties to the previous suit and the parties to the present litigation. If the relationship is such that the conclusion of "privity" or "virtual representation" is appropriate, then the result is consistent with due process and fundamental fairness.

Therefore, the crucial inquiries should be (1) were Petitioners' interests sufficiently aligned with and similar to those of the cities and the Board in the original federal court suit, and (2) were these interests fairly and adequately represented by the cities and the Board in that suit, such that a conclusion of "privity" is fundamentally fair. The second factor, fair and adequate representation, may be easily resolved. Petitioners have not claimed, nor could they reasonably claim, that the cities and the Board did not vigorously, competently and thoroughly litigate the validity of the ordinance as it applied to Southwest. Moreover, three of the Petitioners submitted amicus briefs in support of the ordinance's validity, which received full consideration by the court. 546 F.2d at 102.

The first factor, alignment and similarity of interests, deserves fuller discussion. Petitioners claim in their brief (p. 14) that "the financial interest of the CAB carriers in enforcing the phase-out of Love Field service is not the same as the governmental interest that motivated the cities and the Board." Petitioners also allege in their brief (p. 15) that the "state suit is by the only persons with a direct financial interest in the outcome. The financial consequences were deliberately excluded from consideration in the first suit, to which they were not parties." The facts simply do not support these allegations.

The interests of the parties in the two suits are virtually identical. All the parties are primarily interested in the financial success of the Dallas/Fort Worth Airport. Petitioners have, by virtue of the letter agreements, agreed to indemnify the cities and the Board to assure the retirement of bonds and other indebtedness. Petitioners' interest in the financial welfare of the airport, no matter how great, is not greater than the interest of the cities and the Board themselves. To a certain extent, the national reputation of the cities rests on the successful operation of the airport. Similarly, the ability of the cities to attract and keep industry, thus maintaining their tax base, depends on the airport's success. The collection of landing fees from

Southwest was one motivating force among many in the prior attempt to enforce the ordinance against Southwest. If that had been the only reason for the previous suit, then the cities and the Board would not have sued Southwest since they could have looked to Petitioners for the equivalent under the letter agreements.

The conclusion is thus inescapable: Petitioners' interests are sufficiently aligned with and similar to those of the cities and the Board, and those interests were fully and fairly represented by them. Accordingly, binding Petitioners to the original federal judgment does not exceed due process limits.

Petitioners present a novel argument that Respondents have waived any right to invoke res judicata since Respondents had stated at a hearing below in the district court their concern that the current litigation would not bind Petitioners. By this argument, Petitioners attempt to use a statement of counsel as to a possible future interpretation of the law of res judicata to estop Respondents from raising that defense in subsequent litigation. In the first place, the courts are in accord that preclusion against a party taking inconsistent positions relates only to statement of *fact*, not law. *Sturm v. Boker*, 150 U.S. 312 (1893); *Hartford Fire Ins. Co. v. Carter*, 196 F.2d 992 (10th Cir. 1952). *And see* 1B, Moore's Federal Practice, ¶0.405[8]. Moreover, these statements were taken out of context. Respondents realize that the law of res judicata is sometimes difficult to apply. All would concede that formal joinder of all persons with any possible or remote interest in the litigation, including those who are in privity with persons already parties, simplifies, if not obviates, possible future disputes over the scope of res judicata. But this concern cannot be reasonably viewed as a waiver of the issue before it actually arises. Nor do Petitioners suggest, as indeed they could not, that they somehow have relied upon these statements of concern by Respondents. Even if statements as to the law by counsel were covered by this doctrine of preclusion, no estoppel

can result. Reliance by Petitioners must be shown. *Gleason v. United States,* 458 F.2d 171 (3d Cir. 1972); *Texas Co. v. Gulf Refining Co.,* 26 F.2d 394 (5th Cir. 1928). Petitioners cannot even show that by making such suggestions of possible legal effects that Respondents were somehow benefited in the prior suit. *See Buder v. United States,* 332 F. Supp. 345 (E.D. Mo. 1971). Furthermore, the rule is clear that this doctrine of preclusion is limited to inconsistent *factual* statements made in the *same* proceedings, and not in separate successive proceedings. *In re Double D Dredging Co.,* 467 F.2d 468 (5th Cir. 1972).

III. ABSTENTION AND THE ANTI-INJUNCTION STATUTE

The Petitioners allege that by invoking the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, the courts below have "foresaken federalism." The purpose of the Anti-Injunction Act is to "avoid unseemly conflict between the state and the federal courts." *NLRB v. Nash-Finch Co.,* 404 U.S. 138, 146 (1971). In rejecting this Court's decision in *Toucey v. New York Life Ins. Co.,* 314 U.S. 118 (1941), Congress made a legislative determination that the inability of the federal courts to enjoin the relitigation of issues by state courts was more likely to create conflict than avoid it. The Congress recognized that, although federal courts should generally refrain from enjoining proceedings in state courts, a federal court must retain the injunctive power "to protect or effectuate its judgments." This provision insures that the federal courts can enjoin the relitigation of issues which have been fully and finally adjudicated.

The relitigation exception prevents multiple litigation of the same issue and it assures parties in a federal court that they will not be subjected to the possibility of a subsequent conflicting state court judgment which the Supreme Court may or may not

decide to review. *Woods Exploration and Producting Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1312 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972). Rather than "forsaking" the principles of federalism, the proper use of the relitigation exception defends them. "[N]othing would be more productive of friction between the state and the federal courts as to permit a state court to interpret and perhaps to upset such a judgment of a federal court." *Jacksonville Blow Pipe Co. v. Reconstruction Finance Corp.,* 244 F.2d 394, 400 (5th Cir. 1957).

The Petitioners cite *Lamb Enterprises, Inc. v. Kiroff,* 549 F.2d 1052 (6th Cir. 1977) for the proposition that the principles of equity, comity and federalism require a federal court to refrain from enjoining the relitigation in a state court of a claim that was previously decided by a federal court. The decision of the Sixth Circuit in *Lamb Enterprises* is clearly distinguishable from the present situation and conflicts in no way with the Fifth Circuit decision below. In that case, the D.C. Circuit upheld a district court's judgment which had denied the plaintiff recovery because the suit was barred by the three year statute of limitations in the District of Columbia. The plaintiff then sought to pursue his cause of action in the Ohio state courts. The defendant persuaded an Ohio federal district court to enjoin the parties from "relitigating" the matter in the state courts. The Sixth Circuit held that the injunction was improper because the suit in the D.C. Circuit had not fully and finally adjudicated all of the matters sought to be litigated in the Ohio state court. The Ohio federal district court in *Lamb Enterprises* had improperly enjoined the parties from seeking a state court determination of whether, among other things, the plaintiff was barred by the Ohio statute of limitations to pursue his cause of action.

In the present case, the Petitioners do not contend that the decision in *City of Dallas, Texas v. Southwest Airlines Co. (Southwest I),* 494 F.2d 773 (5th Cir. 1974), *cert. denied,* 419 U.S. 1079 (1974) was not a full and final adjudication on

the merits. Moreover, the Petitioners do not claim that the injunction bars them from presenting any issue in the state court which has not been adjudicated in the federal courts. It only enjoins relitigation of the issue of the validity of the ordinance with respect to Southwest's right to use Love Field. As the Fifth Circuit below explained: "Preventing this affront to the federal judgment will not preclude Texas courts from addressing the legal issues that underlie this dispute." 546 F.2d at 93, n. 29. "The district court injunction applies, quite narrowly, to relitigation of the Love Field controversy only as it affects Southwest. The CAB airlines can continue to litigate their rights to serve Love Field even if the injunction is affirmed." 546 F.2d at 91, n. 19. The state suit was, by admission, a direct attack on the federal court's previous judgment and amounts to nothing more than an attempt to relitigate the identical issues resolved in *Southwest I.*

No one questions the constitutional power of the federal courts to hear a state claim pendent to a federal claim. However, unless the exercise of this power is merely a meaningless formality, a federal court must be free to exercise the injunctive power to protect its judgments from subsequent attack in state courts. Through a strained process of reasoning, Petitioners argue that the previous determination of the issue in *Southwest I* is not worthy of judicial protection. The basis of the argument is that the federal courts should have abstained in *Southwest I* to avoid the disruption of the state's internal affairs which might result from a federal court's interpretation of the powers of a state agency vis-a-vis a city. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Thus, Petitioners contend that the prior suit was a mere "forecast" of Texas law and that the state courts can reconsider the very question answered in *Southwest I.*

The assertion that the District Court in Travis County can review the decision in *Southwest I* is patently outrageous. The effect of this would be to subject all federal court judgments in which a question of state law was involved to subsequent

state suits alleging that the federal court should have abstained in the previous suit. The Petitioners' suggested state court review of federal "forecasts" would effectively destroy the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), since the federal courts could no longer answer questions of state law with authority. There can be no doubt that abstention considerations do not arise after a final judgment in federal court has been entered and the time for direct review has passed. The abstention doctrine is a discretionary device used to accord deference to state courts in matters where state law is uncertain. The failure of a court to exercise this discretion should have no effect on the validity and enforceability of its final judgments.

Should this Court choose to consider, at this late hour, whether abstention was appropriate in *Southwest I*, it will conclude that abstention would not have been proper, and certainly not mandatory. Abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of this obligation to decide cases can be justified under this doctrine only in . . . exceptional circumstances." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188–189 (1959). This Court, in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) has recently described the three instances in which abstention is appropriate.

The first category where abstention is justifiable is in cases questioning the constitutionality of a state law or order where the state law is unclear but is subject to an interpretation which would render it unnecessary to reach the federal constitutional question. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The basis for *Pullman* abstention is the federal court's natural reluctance to unnecessarily declare state statutes unconstitutional. However, in *Southwest I*, no federal constitutional issue of this nature was raised. Moreover, there was no ambiguity in the state law. The absence of any relevant state court decision on that law did not prevent the federal court from correctly applying the unambiguous state law.

See Wisconsin v. Constantineau, 400 U.S. 433 (1971). In addition to the reasons stated by the Fifth Circuit in its opinion below, all doubt as to the clarity of state law as it relates to the Texas Aeronautics Commission's action with respect to Southwest and Love Field was laid to rest by a recent statute enacted by the Texas Legislature. That statute, entitled "Aeronautics Commission–Validation of Certain Actions of the Texas Aeronautics Commission," Tex. Laws, 1977, Chap. 325, §1, at 863, enacted May 30, 1977, effective May 30, 1977, validates *all* orders made by the Texas Aeronautics Commission prior to January 1, 1977, granting certificates of authority to intrastate carriers. (Appendix A.) Even prior to the statute's enactment, the state expressed its approval of the merits of the federal judgment in question. The Attorney General of Texas stated: "The agency charged with general regulatory authority over private airports in Texas is the Texas Aeronautics Commission. V.T.C.S. Art. 46c–6. *See City of Dallas v. Southwest Airlines Co.,* 494 F.2d 773 (5th Cir. 1974)." (A. G. Opinion No. H–973, April 6, 1977.) (Appendix B, Page 2, Paragraph 3.)

The second circumstance in which abstention is proper is to avoid "needless friction" with state policy where unsettled issues are "intimately involved with sovereign prerogative." *Louisana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959). The bare fact that the previous suit involved the relationship of the city and state would not justify abstention in *Southwest I. Allegheny Court v. Frank Mashuda Co.,* 360 U.S. 185 (1959). Furthermore, before a federal court can decline to exercise its properly invoked jurisdiction, there must exist more than the potential for conflict in the results of adjudication. *Meredith v. Winter Haven,* 320 U.S. 228 (1943). There were no "difficult questions of state law bearing on policy problems of substantial public import" presented in *Southwest I.* There was also no possibility of "needless friction" with the state. Although the suit involved a determination of the relative powers of a city and a state agency, both parties voluntarily submitted to the federal court's jurisdiction. Either the cities or the Texas Aeronautics Commission could have

raised the issue of abstention if there was concern that a federal resolution of the state question was inappropriate. "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Employment Services v. Hodory,* ____U.S. ____, 97 S. Ct. 1898, 1904 (1977). As Judge Wisdom stated in the decision below: ". . . it cannot be said that a federal court disrupts harmonious relations with a state by responding to a request by the bickering state agencies to resolve their dispute." 546 F.2d at 93.

The third instance where abstention is appropriate is in those suits where a party seeks to enjoin a state criminal or quasi-criminal proceeding in the absence of bad faith, harassment, or a facially invalid state statute. *Younger v. Harris,* 401 U.S. 37 (1971); *Juidice v. Vail,* ____U.S. ____, 97 S. Ct. 1211 (1977). Of course, *Southwest I* was neither an attempt to restrain a criminal or quasi-criminal proceeding nor an attempt to interfere with state court action of any kind. Thus, since *Southwest I* did not fall within any of the forms of abstention and since no other factors counseled against federal proceedings, abstention in *Southwest I* would have been in error.

Finally, if Petitioners are not considered in privity with any of the parties to the original federal court judgment, as they contend, they have no right to interfere with the federal judgment. By instituting the state court suit, Petitioners are blatantly interfering with the federal judgment. As counsel for one of the Petitioners announced before the state court: "This is [not] an effort to undermine the federal decision . . . . This is a frontal attack on it. The word undermine implies something covert about it. We come in with flags flying." 546 F.2d at 89.

The courts have held that injunctive relief is an appropriate remedy to prevent such intermeddling with federal court decisions. In *Doe v. Ceci,* 517 F.2d 1203 (7th Cir. 1975), the federal district court had enjoined certain personnel responsible for operating and administering a certain county hospital from interfering with doctors performing legal abortions therein.

Subsequently, a resident and taxpayer of the county instituted a state court suit against one of the hospital's administrators and county officials *who had not been parties to the federal court suit*. The Plaintiff in the state court suit sought to enjoin disbursements of county funds to perform abortions in the hospital on indigent women. The plaintiffs in the federal court action then obtained an injunction against the state court relitigation. The Seventh Circuit affirmed, holding that issues sought to be litigated in the state court were identical to some of those adjudicated in the federal court proceeding. The Court noted that "only one of the defendants in the case before Judge Ceci [of the state court], Mundy, had been named in *Doe v. Mundy* [the federal court suit], which would have made it possible for the other defendants before Judge Ceci to contend that they were not bound by the federal order . . . ." 517 F.2d at 1207, n. 3. The court, however, rejected this argument, holding that "[u]nder all the circumstances," *id.*, the injunction was justified, since otherwise the "net result" would be to prevent the parties to the federal court judgment from complying with the federal decree. 517 F.2d at 1206. *See also Montgomery County Board of Education v. Shelton*, 327 F. Supp. 811 (N.D. Miss. 1871); *South Central Bell Telephone Co. v. Constant, Inc.*, 304 F. Supp. 732 (E.D. La. 1969), *affirmed*, 437 F.2d 1207 (5th Cir. 1971).

From a cursory review of the torturous path that this litigation has laboriously followed in the nine years since it began, no one can deny the uncertainty, the waste of resources and the harassment that has occurred. After eight attempts in the last three years, the federal courts have refused to support the ouster of Southwest Airlines from Love Field. The public interest cannot endure this cloud of recurring litigation hovering over our judicial system. The Texas Legislature has, in effect, attempted to end this litigation by passing an act validating the actions of the Texas Aeronautics Commission in the last session just ended. Fundamental justice dictates a court-enforced end to this litigation. By denying this Petition for Writ of Certiorari, the Court can, at last, give final and definitive validation to the many prior judicial determinations of this issue.

CONCLUSION

For the reasons stated above, Respondents respectfully submit that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. David Hughes, attorney for Respondent herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the ____day of August, 1977, I served three copies of the foregoing document, in duly addressed envelopes, with airmail postage prepaid, as required by Rule 33 (1) of this Court upon each of the parties represented in this proceeding.

J. DAVID HUGHES
Assistant Attorney General
P.O.Box 12548
Austin, Texas 78711

APPENDIX

APPENDIX A

AERONAUTICS COMMISSION–VALIDATION OF CERTAIN ACTIONS

CHAPTER 325 [86]

H. B. No. 939

An Act relating to validation of certain actions of the Texas Aeronautics Commission.

Be it enacted by the Legislature of the State of Texas:

Section 1. All orders previously made, prior to January 1, 1977, by the Texas Aeronautics Commission granting certificates of public convenience and necessity for the operation of intrastate air carriers are hereby in all respects validated, ratified, and confirmed.

Section 2. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take affect and be in force from and after its passage, and it is so enacted.

Passed by the House on May 10, 1977: Yeas 125, Nays 9, 6 present, not voting; passed by the Senate on May 19, 1977: Yeas 26, Nays 4.

Approved May 30, 1977.

Effective May 30, 1977.

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86. Vernon's Ann. Civ. St. art. 46c–6 note.

APPENDIX B

THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

April 6, 1977

The Honorable Henry Wade
Criminal District Attorney
Sixth Floor, Records Building
Dallas, Texas 75202

Opinion No. H- 973

Re: Authority to form a joint airport zoning board under article 46e-3, V.T.C.S.

Dear Mr. Wade:

You have requested an opinion of this office on the following question:

> Can the County of Dallas and the City of Mesquite, a municipal corporation, form a Joint Airport Zoning Board under the statutory authority of Article [46e-3] Vernon's Texas Civil Statutes where the ownership and control of the airport is less than absolute?

The statute to which you refer, a part of the Airport Zoning Act, as amended, reads in pertinent part:

> (1) In order to prevent the creation or establishment of airport hazards, every political subdivision having an airport hazard within its territorial limits may adopt, administer, and enforce . . . airport zoning regulations for such airport hazard area . . . .
>
> (2) Where an airport is owned or controlled by a political subdivision . . . and any airport hazard area appertaining to such airport is located outside the territorial limits of said political subdivision, the political subdivision owning or controlling the airport . . . and the political subdivision within which the airport hazard area is located may create . . . a joint airport zoning board, which board shall have the same power . . . .

You advise that the City of Mesquite presently zones the area surrounding a private airport located within its city limits, but the approach for the airport also creates an airport hazard area located in the unincorporated territory of Dallas County. The City has entered a written agreement with the airport owner giving the City a preemptive "right of first refusal," i.e. the privilege of purchasing the facility at the price (deemed acceptable by the owner) actually offered to the owner by a bona fide purchaser. The airport is neither "owned or controlled" by the City of Mesquite nor the County of Dallas otherwise.

A preemptive right of first refusal is not an option but may ripen into an option, which in turn may ripen into a contract of purchase and sale. Sinclair Refining Co. v. Allbritton, 218 S.W.2d 185 (Tex. 1949); Henderson v. Nitschke, 470 S.W.2d 410 (Tex. Civ. App. -- Eastland 1971, writ ref'd n.r.e.). It gives the holder of the right no power to compel an unwilling owner to sell. Owens v. Upper Neches River Municipal Water Authority, 514 S.W.2d 58 (Tex. Civ. App. -- Tyler 1974, writ ref'd n.r.e.). See also Draper v. Gochman, 400 S.W.2d 545 (Tex. 1966). Even the holder of an unconditional option possesses only an executory contractual right that passes no title. Roberts v. Armstrong, 231 S.W. 371 (Tex. Comm'n App. 1921, jdgmt. adopted). See also Click v. Seale, 519 S.W.2d 913 (Tex. Civ. App. -- Austin 1975, writ ref'd n.r.e.).

The facts supplied us indicate that neither the County of Dallas nor the City of Mesquite "owns" the airport within the meaning of the statute. Neither do we believe the airport is "controlled" by either municipal corporation within the meaning of the statute. The term "control" generally connotes the power and right to manage the facility. See State v. Camper, 261 S.W.2d 465 (Tex. Civ. App. -- Dallas 1953, writ ref'd). See also Anderson v. Stockdale, 62 Tex. 54, 61 (1884); Robertson v. State, 159 S.W. 713 (Tex. Crim. App. 1913). While some measure of control may be said to exist by reason of the statutory power conferred by article 46e-3, to zone for "airport hazards," the power extends only to trees, structures, or land use which interfere with the safe use of the airport, and it gives the city or the county no power to regulate the operation of the private airport itself. Cf. Atkinson v. City of Dallas, 353 S.W.2d 275 (Tex. Civ. App. -- Dallas 1961, writ ref'd n.r.e.), cert. denied, 370 U.S. 939 (1962). The agency charged with general regulatory authority over private airports in Texas is the Texas Aeronautics Commission. V.T.C.S. art. 46c-6. See

City of Dallas v. Southwest Airlines Co., 494 F.2d 773 (5th Cir. 1974).

We answer, therefore, that under the facts given us the County of Dallas and the City of Mesquite do not have authority under article 46e-3 to form a Joint Airport Zoning Authority with respect to an airport not owned or controlled by either of them. Cf. Attorney General Opinion M-1278 (1972). We do not address any question relating to any power that the political subdivisions may exercise independently under the first provision of the statute.

S U M M A R Y

The County of Dallas and the City of Mesquite do not have authority under article 46e-3, V.T.C.S., to form a Joint Airport Zoning Authority with respect to an airport not owned or controlled by either of them.

Very truly yours,

JOHN L. HILL
Attorney General of Texas

APPROVED:

DAVID M. KENDALL, First Assistant

C. ROBERT HEATH, Chairman
Opinion Committee

jwb

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1773

TEXAS INTERNATIONAL AIRLINES, INC.; DELTA AIR LINES, INC.; AMERICAN AIRLINES, INC.; FRONTIER AIRLINES, INC.; OZARK AIR LINES, INC.; EASTERN AIR LINES, INC.; AND CONTINENTAL AIR LINES, INC.,
Petitioners,

v.

SOUTHWEST AIRLINES CO. AND
THE TEXAS AERONAUTICS COMMISSION,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

CHARLES ALAN WRIGHT
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Austin, Texas 78705

Attorney for Petitioners

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

This case, as we said in our initial submission, raises no issue about whether Southwest Airlines should fly from Love Field or DFW (Petition 8). That issue, if petitioners are successful here, will be determined by the state courts in Texas. All that this Court is asked to decide is the due process issue on the extent to which one may be bound by a judgment in an action to which he is not a party and the federalism issue of enjoining state court litigation that could provide a definitive answer to

a question on which the federal courts have made a forecast.

That point bears repeating because Southwest has devoted more than half of its Brief in Opposition to an extensive restatement of the case largely devoted to matters that have no relevance to the issues presented here. In this process Southwest has misstated facts, used half-truths, misleading statements, and mistaken analogies, and gone outside the record to create a false and emotionally charged atmosphere clearly intended to prejudice the Court in its consideration of this case.

In an apparent attempt to analogize the Love Field-DFW situation with a situation with which the Court is familiar, Southwest compares Love Field and DFW to Washington National Airport and Dulles Airport and its services to Eastern's shuttle service.[1] It goes on to say that Eastern's shuttle service could not possibly survive at Dulles and that "forcing Southwest to serve Dallas through DFW will bankrupt the airline. This is why 'narrowly viewed' this case concerns only Southwest's right to serve Love Field, but, broadly viewed, it concerns Southwest's right to survive." (Southwest Brief 6) This statement has no relevance to the present issues, and is quite contrary to what Southwest is saying publicly. A report of April 11, 1977, in the *Aviation Daily* states that Mr. Lamar Muse, Southwest's President, made the following statement to the Association of Airline Analysts in New York:

> "If Southwest were ordered to abandon Love Field and transfer operations to Dallas/Fort Worth Airport, business might drop off for about 90 days, but then would pick up again after passengers had 'driven the interstate' to Houston or San Antonio."

[1] The analogy is a mistaken one. DFW is 17 miles from both Dallas and Fort Worth. Love Field is 7 miles from downtown Dallas. Dulles is 26 miles from Washington while National is only 3 miles away. See the *Official Airline Guide* which also shows that the average travel time from DFW to Dallas is the *same* as from Love Field to Dallas, and that the travel time from Love Field to Dallas is *greater* during rush hours.

Thus while Southwest makes public statements that moving to DFW would not seriously affect it, it tells this Court that its very survival is involved.

Southwest portrays the events leading up to the construction of DFW as a sinister scheme, instigated by the CAB carriers for their economic advantage, and acquiesced in by the Cities, the Airport Board, the CAB, and the FAA (Southwest Brief 6-16). The well-documented fact is that Love Field had become saturated, it could not be expanded, and there was an overwhelming public necessity for a large new airport to serve the entire area.[2] This was not an economic advantage to the CAB carriers, whose landing fees increased from less than 5¢ per 1000 pounds of landed weight at Love to almost $1.00 at DFW.

Southwest suggests that the "Certificated Air Carrier Services" covered by the "phase-out provision" were cunningly defined in the Bond Ordinance so that Southwest would be barred from Love but the CAB carriers could continue to use it for service to Texas points. It was understood by the Cities, in 1968 when the Bond Ordinance was passed, and by the CAB carriers, in 1970 when they entered into the Letter Agreements undertaking to move all their certificated services to DFW, that this definition includes all scheduled airline service of every nature whatsoever provided by CAB and TAC certificated carriers except air taxi operations. Because Southwest, by its strained reading of the Bond Ordinance, raised a question about this in the first case, petitioners, as part of their prayer for relief in the state court action,

[2] See, *e.g.*, the CAB's Order E-22028 dated April 13, 1965.

have asked for a declaration that the definition in question covers all scheduled service of all major airlines.

Southwest further states that "as a consequence of their anticompetitive actions against Southwest, several of the CAB carriers are presently under grand jury investigation for violation of federal antitrust laws." (Southwest Brief 5) This gross attempt to prejudice the Court is inexcusable on its face inasmuch as it has nothing to do with this case and is not a part of the record in this case. It is particularly unfair because of the implication that a number of the petitioners are under investigation. There has never been any investigation of which petitioners are aware of any carriers other than Braniff Airways and Texas International under its prior management. Braniff is not one of the petitioners in this case. Petitioners do not believe that anyone, including Southwest, has heretofore claimed that American, Delta, Eastern, Continental, Frontier or Ozark has been involved in any anticompetitive action against Southwest. Indeed, it was Delta that subleased concourse space to Southwest at Love Field and in Houston so that it could begin its operations in 1971; it was American that agreed to handle Southwest's reservations, and it was Frontier that provided baggage services and counter space to Southwest.[3] More recently, American agreed to sublease space to Southwest at El Paso so that Southwest could begin service on its new route to that City.

Southwest refers to Section 9.5 of the 1968 Bond Ordinance providing for the phase-out of Love Field and the other public airports owned by the Cities upon the opening of DFW as designed "to suppress free competition" (Southwest Brief 11). Such provisions are common, however, to secure revenues and to assure the bondholders that the issuers of the bonds will not operate competitive

[3] See CAB Order 72-6-120 approving these agreements.

facilities that would result in a diversion of revenues. Moreover, the ordinance including these provisions was approved by the Attorney General of Texas.

We think that none of this has any relevance to the due process and federalism issues here presented. We have commented on several of the more glaring misstatements in Southwest's restatement of the case so that we will not be thought, by silence, to accept those statements or other statements by Southwest that have no purpose except to attempt to prejudice the Court.

II.

Both respondents take the position that the facts in this case are so unique and so unlikely to be repeated that this Court should not decide the questions raised by it (TAC Brief 2-3; Southwest Brief 39). What they overlook is that the facts in all cases are unique and unlikely to be repeated. It boggles the mind to suppose that the facts, for example, of *Brewer* v. *Williams*, 97 S. Ct. 1232 (1977), or *Piper* v. *Chris-Craft Industries, Inc.*, 97 S. Ct. 926 (1977), will ever be repeated. Yet those cases raised important legal issues on which this Court's pronouncements will provide guidance in a host of similar, though factually quite different, cases. So it is here.

The res judicata and due process questions presented by this case are not addressed in any of the decisions cited by Southwest or the TAC and, as the Fifth Circuit said, this case "requires us to refine the preclusive effect of government litigation."[4] 546 F.2d at 99 (App. 27a). Numerous cases have arisen recently that raise this ques-

[4] Southwest, for example, again relies (Southwest Brief 25) on *Berman* v. *Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952), although the Fifth Circuit said: "The CAB carriers correctly distinguish *Berman* by arguing that their pecuniary interest in the success of the new airport surpasses the interests possessed by members of the general public or taxpayers." 546 F.2d at 98 (App. 27a).

tion about government litigation,[5] and indeed this Court had such an issue before it only last term. In *Town of Lockport* v. *Citizens for Community Action*, 97 S. Ct. 1047 (1977), the Court held that a judgment adverse to a county, in a suit in which it purported to sue on behalf of its citizens and voters, had no preclusive effect on citizens and voters who brought their own later action, since the later plaintiffs "had not been parties to the earlier suit and were not in privity with the county of Niagara, which had brought it." 97 S. Ct. at 1051. Though we think that that holding was correct, and that it supports the position we take here, the single footnote the Court devoted to the issue is not all that needs to be said on the res judicata effect of government litigation. Beyond that, the general question of the extent to which preclusion applies to non-parties is an area in which the lower courts are reshaping the law as it had been understood and on which they need guidance from this Court.[6]

In addition, the proper relation between the state and federal courts and the extent to which federal courts should be involved in state internal affairs are important and difficult matters as a long series of this Court's decisions has shown. We have recently seen that even a unanimous decision here only five years ago was not the last word on the meaning of the "expressly authorized" exception to the Anti-Injunction Act, 28 U.S.C.A. § 2283, and that the Court is far from being of one mind about that exception. *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S. Ct. 2881 (1977). This Court has never spoken about the

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[5] *E.g.*, *Elliot Advertising Co.* v. *Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970); *Williamson* v. *Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), vacated on other grounds 97 S. Ct. 1891 (1977); *Aerojet-General Corp.* v. *Askew*, 511 F.2d 710 (5th Cir. 1974); *Patterson* v. *Burns*, 327 F. Supp. 745 (D. Haw. 1971).

[6] Comment, *The Expanding Scope of the Res Judicata Bar*, 54 Texas L. Rev. 527 (1976).

"relitigation" exception since it was written into the statute in 1948, and the conflict between the decision below and the Sixth Circuit's decision in *Lamb Enterprises, Inc.* v. *Kiroff*, 549 F.2d 1052 (6th Cir. 1977), *cert. denied* 97 S. Ct. 2926 (1977), emphasizes the need for an authoritative interpretation of it.

Great reliance is placed by respondents on the argument that the only claim of petitioners is based upon the 1968 Bond Ordinance on which the Cities based their claim and that the relief sought by the CAB carriers is the same as the relief sought by the Cities. These arguments do not meet the due process point involved. Due process is not satisfied merely because a party who has not been heard before intends to present "the identical issue," *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971), nor because, as the lower court said in the *Town of Lockport* case, plaintiffs in the second case are "seeking essentially the same relief." 386 F. Supp. 1, 5 (W.D.N.Y. 1974).

III.

Southwest maintains that questions of federalism and abstention are not raised here because the decision in the first case did not present difficult questions of state law. It says that the result there was required by "the plain language of Texas constitutional and statutory provisions and the specific and recent direction of the Texas Supreme Court," citing *Texas Aeronautics Commission* v. *Braniff Airways, Inc.*, 454 S.W. 2d 199 (Tex. Sup. 1970) (Southwest Brief 35). As we have already shown (Petition 22), that case did not deal in any way with the question of the TAC's authority over airports of which the Fifth Circuit spoke in the first decision. It is interesting in this regard to note that the TAC now appears to admit the "absence of any relevant state court decision" (TAC Brief 11).

Since there is no state court case on whether the TAC or municipalities control municipally owned airports, the

specific power given to municipalities by the Texas Municipal Airports Act (Petition 21) casts grave doubt on the Fifth Circuit's holding that the TAC can countermand this power. These doubts are strengthened by the facts that: (1) the certificate issued to Southwest did not mention Love Field; (2) the Minute Order, in which the TAC purportedly ordered Southwest to stay at Love Field, did not mention either Southwest or Love Field; (3) the Texas Attorney General approved the Bond Ordinance, and could not have done so if the provisions phasing-out Love Field services had been beyond the power of the Cities; and (4) the Texas Legislature had ratified the Bond Ordinance. Tex. Laws. 1969, c. 47 §§ 2, 3.

Southwest and the TAC further contend that there is no question of disrupting internal state procedures or of creating needless friction because the state agencies themselves submitted the dispute to the federal court for resolution in the first case. This is not really true. The Cities brought suit in the federal court against Southwest to resolve what they contended was a federal question. They had no way of knowing that any particular state issue would be raised by Southwest or that the TAC would intervene on behalf of Southwest. Moreover, it seems likely that the Cities did not consider the state issue to be a serious one even after it was raised because of what the Cities thought was their clear power under the Texas law, the apparent lack of power of the TAC and the Attorney General's previous approval of the ordinance. The issue of the TAC's authority over airports under state law was selected by the Fifth Circuit from many issues raised in the first case.

The TAC argues here that "all doubt as to the clarity of state law as it relates to the Texas Aeronautics Commission's action with respect to Southwest and Love Field

was laid to rest by a recent statute enacted by the Texas Legislature" (TAC Brief 12). The statute, which is appended to the TAC Brief, validated "all orders * * * granting certificates of public convenience and necessity for the operation of intrastate air carriers." Apparently the TAC finds hidden meanings in this statute similar to those that Southwest found in its certificate. There is no issue whatever in this litigation about the validity of Southwest's certificate to serve "Dallas/Fort Worth," as the certificate puts it, but the certificate does not mention Love Field and the 1977 statute does not purport to validate any judicial interpretation of any particular certificate.

The TAC also finds support in a 1977 Attorney General's opinion having to do with the TAC's purported authority over private airports (TAC Brief 12). But this case involves a public airport, and would not be covered by the Attorney General's opinion, even if it is correct. Its correctness is questionable, since neither the first decision of the Fifth Circuit nor the Texas Aeronautics Commission Act (Appendix H to the Petition), which are cited by the Attorney General, say that the TAC has any power over private airports. Indeed the Fifth Circuit said: "Were Love Field a private airfield, constructed without public funds, it may be assumed that the owner could exclude anyone he liked." 494 F.2d at 776 (App. 4c).

As the recent litigation about the Concorde has shown, there is nothing inherently improbable in a regulatory scheme that leaves to local governmental authorities control over who may use airports they own. *British Airways Board* v. *Port Authority of New York and New Jersey*, 46 U.S.L.Wk. 2001 (2d Cir., June 14, 1977). On the face of the Texas statutes, this is the scheme Texas

has chosen. The Texas courts should be allowed to determine whether the Texas statutes mean what they say.

Respectfully submitted,

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